

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

Applicant: Woolworths Limited
(represented by Mr Gavin Crocket of GD Crocket & Co)

First Intervener: Executive Director of Public Health
(represented by Mr Sam Nunn of State Solicitor's Office)

Second Intervener: Director of Liquor Licensing
(represented by Mr Sam Nunn of State Solicitor's Office)

Objectors: City of Melville
As listed in the introduction to the determination para 2

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Ms Helen Cogan

Date of Hearing: 22 June 2011

Date of Determination: 30 August 2011

Premises: Premises to be known as Dan Murphy's Bicton, situated at Melville Plaza Shopping Centre, 378 Canning Highway, Bicton

Matter: Application for the conditional grant of a liquor store licence referred under Section 24 of the *Liquor Control Act 1988*

Determination: The Application is refused

Authorities Considered in the Determination:

- *Baroque Holdings Pty Ltd v Aljohn* (1992)
- *Liquorland (Australia) Pty Ltd v Hawkins* (1997) 16 WAR 325
- *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405
- *Executive Director of Health v Lily Creek International Pty Ltd and Ors* (2000) WASCA 258; 22 WAR 510
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors* [2001] WASCA 410
- *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207
- *Malec v JC Hutton Pty Ltd* (1990) 169 CLR
- *Hay Properties Pty Ltd & Anor -v- Roshel Pty Ltd*, unreported; FCt SCt of WA; Library No 980496; 20 July 1998

Introduction

- 1 On 27 July 2009 Woolworths Limited lodged an application with the Director of Liquor Licensing for the conditional grant of a liquor store licence, pursuant to sections 47 and 62 of the *Liquor Control Act 1988* ("the Act"), in respect of premises to be known as Dan Murphy's Bicton and located at 378 Canning Highway, Bicton.

- 2 The application was advertised in accordance with instructions issued by the Director of Liquor Licensing. Objections to the grant of the application were lodged by:
 - Paula Sanders
 - Donald Eric and Judith Ann Truscott
 - Samatha Brown and Craig Hards
 - Pamela Tenknoff
 - Edward George Sanders
 - Stanley Harold Wallin
 - Tania Burge
 - Valerie Jennings
 - Elizabeth Sanders
 - Brian Sanders
 - Sarah Sanders
 - Paula Yvonne Prichard
 - Patricia Helen Watkins
 - Leslie and Hazel Smith
 - Vasilios Giannopoulos
 - Timothy John Johnston
 - Frank Lopresti trading as the Formula Pharmacy
 - Reverend Andrew Robinson, Bicton Presbyterian Church
 - Dr Janet Woollard MLA, Member of Alfred Cove, on behalf of concerned constituents
 - Kingston Holdings Pty Ltd (which later withdrew its objection).

- 3 Pursuant to section 69(8a)(b) of the Act the Executive Director Public Health lodged a Notice of Intervention, while the City of Melville lodged a letter opposing the application.
- 4 On 1 February 2011 the Director of Liquor Licensing, pursuant to section 24 of the Act, referred the application to the Commission for determination. The Director subsequently lodged a Notice of Intervention under section 69(11) of the Act.
- 5 A hearing before the Commission was held on 22 June 2011.

Submissions on behalf of the Applicant

- 6 The applicant seeks to open a Dan Murphy's liquor store adjacent to the Melville Plaza Shopping Centre in Bicton. The Melville Plaza Shopping Centre is the food and grocery hub of the Melville District Centre, and comprises a Coles Supermarket, as the anchor tenant, and 23 retail shops/financial institutions. The shopping centre attracts approximately 1.7 million people per annum.
- 7 The proposed liquor store will be located in an existing stand alone vacant building on the western side of the shopping centre. Following refurbishment, the building will provide approximately 1,843 m² of floor space consisting of 1,296m² of display/sales area and 547m² of storage, amenities and office space.
- 8 It was submitted that Dan Murphy's is an established, reputable liquor store brand which successfully operates in other parts of Australia, but is relatively new to the WA market. The proposed liquor store will provide a matrix of services which will be hallmarked by:
 - large, stylish facilities designed to provide a pleasant and unique shopping experience;
 - the best range of liquor (over 4,000 product lines) including local, Australian and international products;
 - the best possible prices;
 - a dedicated fine wine area;
 - knowledgeable, well-trained staff;
 - a commitment to providing "the best range of premium wines of any Australian retailer"; and

- superior customer service facilities such as twice weekly wine tastings, special events, gift cards, event planner services and trolleys for customers.

9 According to the applicant, almost 26,000 people live in the locality, which consists predominantly of Australian born adults with higher than average incomes. Although some alcohol-related harm and ill-health occurs in the region which contains the locality, the level of harm or ill-health is no greater than or inconsistent with, that which occurs in the Perth metropolitan area as a whole. In addition, the applicant commissioned specific research to determine whether the operation of Dan Murphy's liquor stores in other areas had negatively impacted on existing levels of harm or ill-health. The three areas selected for review where Dan Murphy's liquor stores operate were Balga, Albany and Mandurah. According to the applicant's research there was no measureable increase in harm or ill-health in these areas following the grant of liquor store licences for Dan Murphy's stores. The applicant was therefore of the view that the grant of this application would be unlikely to negatively impact on any alcohol-related harm or ill-health that occurs in Bicton. Furthermore, the applicant submitted evidence from Dr John Henstridge, an experienced statistician, who is the Managing Director of Data Analysis Australia. Dr Henstridge's evidence related to the possible negative impact that the grant of the application may have from a harm perspective, and in particular whether an increased density of liquor outlets increases measured harm. After reviewing various studies relating to outlet density, Dr Henstridge concluded that while there have been a number of studies that have attempted to objectively understand the relationship between liquor outlets and harm, this is an inherently difficult research question and few studies have addressed it in a convincing manner because:

- many of these limitations are associated with problems of the data itself that is far from ideal;
- many of the analyses are flawed in that they do not distinguish between outlet types; and
- to his knowledge, none of the studies have attempted to consider management practices.

10 The applicant submitted that the grant of the application will have a number of positive benefits, including:

- the premises will introduce a packaged liquor amenity of a modern liquor store, co-located with a major supermarket and complimentary services within the Melville District Centre and conveniently located off Canning Highway, being a major arterial road;

- the premises will provide convenience to the 1.8 million visitors to the Centre per annum;
- an existing run down building will be redeveloped which will add to the amenity and safety of the area and no changes to the existing traffic or parking arrangements are required; and
- as a branded Dan Murphy's store, the premises will appeal to older, more affluent and discerning customers.

11 It was also submitted that there is no existing packaged liquor outlet south of the Perth CBD, let alone the locality, that provides a combination of superior customer service, knowledgeable trained staff and an extensive product range of local, national and international liquor products, with a focus on fine wines (including a Cellar Release Program) at the one location. Whilst there are nine commercial liquor outlets in the locality, all, except the First Choice liquor store, are small to medium sized convenience stores, generally carrying between 700-1200 product lines. International wines, fine wines and premium wines are poorly represented at these stores. The First Choice liquor store is a larger store with a product range of approximately 2,000-2,500 lines and is principally a liquor barn attached to a hotel that sells mostly mainline products at competitive prices and while providing a better selection of international wines, fine wines and premium wines compared to the other existing packaged liquor outlets, overall the range of these types of wine is noticeably smaller compared to what the proposed Dan Murphy's liquor store will provide. In this regard, evidence was submitted of the needs of 6 members of a wine club for different wines that they could not source from existing liquor stores without some difficulty. Most of the members' homes or businesses were relatively close to the proposed Dan Murphy's Bicton Store and the members of the wine club supported the application because of the product range, product knowledge and the additional services, facilities and educational programmes that the proposed Dan Murphy's store would offer. The applicant also submitted 11 letters of support from local residents which were lodged with the City of Melville when it was considering the Planning application for the proposed store.

12 According to the applicant, it is committed to working to minimise and manage the risk of alcohol-related harm to the local community. The applicant will implement and rigorously enforce at the premises comprehensive management practices and policies that are in place at its licensed premises throughout Australia. Dan Murphy's stores are unattractive to "at risk" persons due to the design of the stores, presence of numerous staff and management practices.

13 In order to fulfil its obligations under section 38 of the Act, the applicant submitted a Public Interest Assessment (PIA) together with additional evidence and expert reports. The expert reports included a town planning report (The MGA Report), an environmental and health assessment (the Caporn Report) and a traffic impact assessment (the Traffic Report).

14 The MGA Report:

- identified the locality for the application;
- identified the characteristics of the locality;
- made observations on the demographics of the locality and provided a socio-demographic profile;
- reviewed from a town planning perspective, the nature of the immediate surrounds for the proposed premises and commented on the appropriateness of the premises in this location;
- identified, reviewed and commented on each of the liquor licences authorised to sell packaged liquor in the locality and reviewed the services and amenity of each; and
- considered the requirement of the public for the services to be offered at the proposed premises.

15 The Caporn Report:

- considered the health and environmental aspects relevant to the application taking into account the demographics of the locality, health and crime statistics for the locality; location of the premises and the services to be offered from the proposed premises;
- looked at the nature of the locality and the services, facilities and amenities of the locality;
- identified, what, if any, sensitive or at-risk groups or places in the locality or within close proximity to the licensed premises;
- detailed consultations undertaken with the local government authority and police;
- reported on the existing packaged liquor facilities in the locality; and
- considered the appropriateness of the proposed premises.

16 The Traffic Report considered:

- traffic generation and site access for the premises;

- traffic impacts of the premises on the surrounding environment;
- impact on the road network traffic safety and efficiency; and
- traffic operations of other nearby liquor outlets.

17 Overall, it was submitted that the proposed premises will provide an unrivalled matrix of packaged liquor services specifically designed to meet the requirements of modern day consumers which are not provided for by existing packaged liquor outlets in the locality.

Submissions on behalf of the Director of Liquor Licensing

18 The purpose of the Director's intervention was to raise the question of whether the grant of the application is in the public interest particularly in the context of whether the application caters for the requirements of consumers for liquor when regard is given to the proper development of the liquor industry, on the basis that:

- The proposed premises is considerably larger than any other premises in, and immediately beyond, the locality having a proposed sales area of approximately 1400m² compared to the average sales area of other premises of 200m²; and
- The proposed premises are within 500 metres of a similar packaged liquor outlet, Leopold Hotel First Choice Liquor, which has an approximate floor space of 895m².

19 It was the Director's submission that catering for the requirements of consumers for liquor services having regard for the proper development of the industry is one of three primary objects set out in section 5(1) of the Act. Therefore, an applicant must not only demonstrate that grant of the application will cater for the requirements of consumers; it must address the requirements of consumers in the context of the proper development of the liquor industry.

20 The meaning and scope of the phrase "the proper development of the liquor industry" is undefined, although it remains an object to which the licensing authority must have regard when carrying out its functions under the Act. Some guidance as to what constitutes the "proper development of the liquor industry" may be obtained by reference to decisions made prior to the 2006 amendments to the Act, however caution should be exercised when having regard to these decisions because of the change in the nature to the test to be applied post the 2006 amendments.

- 21 It was submitted that the proper development of the liquor industry is focused on the services available to consumers and not on the impact on competitors, although they may be interrelated. Whilst the Act is not designed to protect a monopoly or market share of an existing licensee, the capacity of existing licensed premises to continue to offer services in respect of the supply of liquor and related services to members of the public in the locality should be taken into account (refer for instance to *Baroque Holdings Pty Ltd v Aljohn (1992)*; *Liquorland (Australia) Pty Ltd v Hawkins (1997)* 16 WAR 325; *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999)* 20 WAR 405).
- 22 The proximity of this proposed liquor store, with 1400m² sales area and to be operated by Woolworths Ltd, to the Leopold Hotel First Choice Liquor which has a sales area of about 895m² and operated by Coles Group Ltd, also has implications for the development of the liquor industry when both operators have aggressive marketing and pricing structures. Both operators claim they won't be beaten on prices and it has been reported these chains have at times been selling liquor at below wholesale price, with some small retailers resorting to purchasing product from these larger chain retailers rather than producers.

Submissions on behalf of the Executive Director Public Health

- 23 The Executive Director Public Health ("EDPH") intervened in the application for the purposes of introducing evidence or making representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill-health.
- 24 It was submitted by the EDPH that interventions in relation to alcohol-related harm are routinely framed in general terms of the potential for alcohol-related harm to eventuate and specific evidence relevant to the locality of an application can be difficult to obtain and substantiate. Nonetheless, minimising alcohol-related harm is one of the primary objects of the Act and in weighing and balancing the competing interests and other relevant considerations to determine whether an application is in the public interest, it is open to the Commission to consider the concerns and evidence presented by the EDPH.
- 25 The potential for harm or ill-health to people that may result as a consequence of the grant of an application, irrespective of whether the harm or ill-health is proved on a balance of probabilities is a powerful public interest consideration. The mere possibility of harm or ill-health would always be a relevant matter for the licensing

authority when discharging its functions (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* (2000) WASCA 258; 22 WAR 510).

- 26 In this context, the EDPH has identified a number of characteristics of this application that have the potential to contribute to alcohol-related harm and ill-health, including:
- the availability of cheap liquor;
 - the large size of the proposed premises;
 - its close proximity to other licensed premises; and
 - the associated increase in the physical and economical availability of packaged liquor in the community.
- 27 The EDPH provided a variety of research material to support his concerns. For example, a recent local study by Gardiner, R & Coase, P dated March 2011, *Cheap Drinks*, Drug and Alcohol Office, Department of Health, establishes a link between the price of alcohol and consumption. The EDPH also referred to the work of Chikritzhs, T., Catalano, P., Pascal, R., and Henrickson, N (2007), *Predicting Alcohol-related harms from licensed outlet density: A feasibility study*. Monograph Series No. 28. National Drug Law Enforcement Research Fund, Commonwealth of Australia, Hobart. This study specifically seeks to identify a link between outlet density and harm.
- 28 In summary, it was submitted by the EDPH that:
- The area affected by the application is broader than the immediate 2km vicinity, as the proposed premises is a “destination liquor store” targeting locals and people passing through the region. As a result it is appropriate that the evidence on which the EDPH relies is not limited to the locality;
 - Police data shows that overall there is already a level of alcohol-related harm in the locality and surrounding suburbs, in particular violence and drink-driving;
 - Media reports and advertisements indicate that the applicant is a retailer who promotes the sale of cheap liquor;
 - There is sufficient documentation to establish a link between the price of alcohol, alcohol consumption and alcohol-related harm, specifically that an increase in the availability of alcohol leads to an increase in alcohol consumption which in turn is linked with increased violence, drink-driving and property damage, The

conclusion to be drawn regarding the potential for the relative price of liquor to influence consumption is supported by evidence provided by the EDPH;

- There are also published studies that establish the connection between the sale of packaged liquor and alcohol-related harm;
- Recent media reports indicate the level of community concern in regards to alcohol-related harm and the availability of cheap liquor; and
- Although the applicant may adopt some harm minimisation strategies within the bounds of its licence, the fundamental issue is the general risk to persons in the locality and surrounding suburbs promoted by the increased access to cheap liquor which is consumed away from the premises.

29 Consequently, the EDPH submitted that the impact of increasing the physical and economical availability of packaged liquor and the potential for even a minimal increase in the risk of alcohol-related harm are relevant to consider when the Commission determines the application.

Submissions on behalf of the objectors

30 As set out earlier in this decision, there were a number of objections from or on behalf of local residents and a local business operator to the grant of the application.

31 In the main, these objectors are opposed to the grant of the application because the area is already well serviced with liquor outlets; there is a church and three primary schools in the local area; there will be increased vehicular traffic which may result in increased accidents; and there may be increased crime and anti-social behaviour. Many objectors lodged a pro forma statement to support their objection.

Submissions on behalf of the City of Melville

32 The City of Melville was opposed to the grant of the application due to the number of existing liquor outlets in the area and the possibility that another liquor outlet could contribute to incidences of anti-social behaviour.

Determination

33 Pursuant to section 38(2) of the Act, an Applicant for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.

34 Section 38 of the Act was substantially amended in 2007 by the *Liquor and Gaming Legislation Amendment Act 2006*. As a consequence, the old “needs test” was replaced with a broad public interest consideration.

35 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd (2007) WASCA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”

36 Also, section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material, including the Second Reading Speech to a Bill, when considering the meaning and intent of a written law.

37 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, p 6342*) the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, 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.”

- 38 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.
- 39 Furthermore, advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities* supra). The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;
 - to minimize harm caused to people, or any group of people, due to the use of liquor; and
 - 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.
- 40 Each application must be considered on its merits (section 16 of the Act). However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimizing alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health -v- Lily Creek International Pty Ltd & Ors [2000] WASCA 258*).
- 41 The applicant seeks to refurbish an existing vacant building adjacent to the Melville Plaza Shopping Centre in order to establish a 1,843 m² packaged liquor outlet trading under the Dan Murphy’s banner. The display/sales area will be approximately 1,296m² and the storage area will be about 547m², making this proposed outlet one of the largest liquor stores in the State. Voluminous material was submitted by the applicant in support of its application and by the interveners.
- 42 In respect of the harm or ill-health that may be caused to the community by the grant of the application, the Commission is unable to reach a negative conclusion based

upon the evidence and material advanced by the EDPH. Whilst general harm data is relevant and of assistance to the licensing authority in its determination and should be given due consideration, the weight to be given to this general data will depend on the circumstances of each application, particularly where the general harm data is supported by more specific evidence relating to the area to which the application relates. This approach is consistent with the views of Wheeler J in *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors* [2001] WASCA 410 where she said:

“The Act directs attention to the minimisation of alcohol related harm generally (s 5(1)(b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the “risk” of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made.”

43 In a more recent decision in Victoria, *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207, Bell J said:

“As the tribunal has held, every application for a liquor licence cannot be refused on the basis of general harm minimisation evidence. That would be a perversion of the regulatory scheme. The legislation regulates the supply and consumption of liquor by individuals exercising freedom of market choice. It acknowledges the benefits which the industry brings and provides a regulatory framework for the realisation of those benefits.

But by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and

admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the ‘particular local, social, demographic and geographic circumstances’ of the given case.”

- 44 It is also important to observe that the primary object in object 5(1)(b) of the Act is to ‘minimize’ harm or ill-health, not to prevent harm or ill-health absolutely. Furthermore, the statutory framework is not predicated upon the concept of prohibition, but establishes a regulatory mechanism for the granting of liquor licences and the operation of licensed premises which are in the public interest.
- 45 In this case, the harm data presented by the EDPH does not reflect a local community experiencing any greater levels of alcohol-related harm than that which appears to be commonly accepted in the community. The evidence from the applicant is that there has been no increase in alcohol-related harm in other areas where Dan Murphy’s stores operate and although the EDPH cautioned against the significance of this data, the Commission’s gives it some weight when considering the impact of the application from a harm minimisation perspective, particularly in the absence of any contradictory evidence. Conflicting evidence (in the form of expert reports) was submitted relating to the potential negative impact that granting another large liquor store in the area, which already has a number of established packaged liquor outlets, may have. But as already observed, the locality of the proposed liquor store does not currently experience above average levels of alcohol-related harm and notwithstanding data relating to outlet density, the Commission in this instance, is unable to conclude or predict (refer *Malec v JC hutton Pty Ltd (1990) 169 CLR*), on the balance of probabilities, that the grant of the licence would pose an unacceptable risk of increased alcohol-related harm in the local community when regard is given to the “particular local, social, demographic and geographic circumstances” of this case.
- 46 The Director of Liquor Licensing raised concerns about the potential impact that the grant of the licence may have on the capacity of existing licensed premises to continue to offer services in respect of the supply of liquor and related services to members of the public in the locality. The scheme of the Act is not about protecting the market share of individual licensees, however the diminution of services to a community if a particular licence is granted may be part of the public interest

consideration, depending on the individual circumstances. However in this case, there was no compelling evidence that the grant of this application would have such a result.

47 Also, in consideration of the evidence submitted by the applicant, particularly the MGA Report, the Caporn Report and the Traffic Report, the Commission is satisfied that the grant of the application will not negatively impact on the amenity of the locality or cause undue offence, annoyance or disturbance to people who reside or work in the vicinity of the proposed premises.

48 As observed earlier, in considering whether the grant of an application is in the public interest, the Commission needs to consider both the positive and negative aspects of the application and how the application will promote the objects of the Act, particularly the harm minimisation objective and whether the grant of the application will 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.

49 The applicant submitted that the grant of the application will provide a number of benefits to the local community, including increased competition; the introduction of a large, modern liquor store with superior customer service and product range; the convenience to the 1.8 million visitors to the shopping centre per annum; the redevelopment of the run down building and a branded Dan Murphy's store which will appeal to older more affluent and discerning customers. To demonstrate that the grant of the application will cater to the requirements of consumers for liquor and related services, the applicant essentially relies upon the support from the Wine Club; the 11 letters of support from local residents which were lodged with the City of Melville when it was considering the Planning application for the proposed store; and the general assertion that because Dan Murphy's stores have proven to be popular in other localities it will therefore be popular in this locality.

50 At the hearing before the Commission, counsel for the applicant was questioned by the Commission about the level of evidence submitted to demonstrate that the grant of the application will cater for the requirements of consumers and how in other applications a market survey, for example, was conducted to reflect consumer demand. In response, counsel for the applicant stated (at pg 42 of the transcript):

"In terms of the market survey, our position was that we believe the application on its own merits were so strong that it would speak for itself,

especially when you compare it to the other stores in the area and especially given you look at the overall position of Dan Murphy's in the Perth market where there is this demand. What you have to take in to account, there is no counter-evidence to suggest that those 10 people and the Wine Club is not sufficient, in our view, to support the application. We have local and we have residents living in and outside the area saying "We can't access products, we don't like" – and you'll see in the Wine Club, it's quite detailed, "We simply don't like it."

- 51 In considering the issue of what may constitute adequate evidence of the requirements of the public, Malcolm CJ in *Hay Properties Pty Ltd & Anor -v- Roshel Pty Ltd*, unreported; FCt SCt of WA; Library No 980496; 20 July 1998 said:

"In my opinion it is plain that the question whether the six witnesses and 11 persons who wrote letters of support, all of whom spoke of the need for a liquor store, constituted a sufficient sample or section of the public to be representative is a question of fact and degree rather than a question of law. The total population in the affected area was 3,200. In the context, particularly having regard to the absence of any contrary evidence from members of the public, I am of the opinion that it was open to the learned Judge to conclude as he did

What is a significant section of the public and what number of persons may be said to be representative is necessarily a question of fact and degree depending on the population of the affected area and a range of other circumstances. In my opinion it is not a question of law.....

While survey evidence may be extremely helpful in providing evidence of the subjective requirements of a significant section of the public, it is not possible to say that such evidence is essential. Where a limited number of persons give evidence the question is whether the Court is able by seeing and hearing the witness to conclude that the views expressed are representative of a significant section of the public so as to enable the relevant findings to be made...."

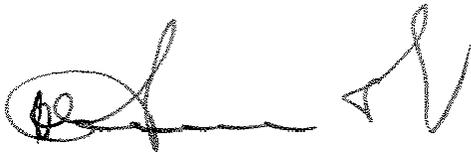
- 52 The Commission is quick to note that the *Hay Properties* case was determined under the previous provisions of the Act which related to the "needs test" and that this test no longer applies. There is nonetheless a corollary of the principles in that case to the issue of what evidence is necessary to demonstrate that the grant of a licence will cater to the requirements of consumers, and consequently promote one of the primary objects of the Act.

- 53 The Commission is of the view that the evidence submitted in this case does not satisfy the Commission that the grant of the application for a new liquor store licence at this location will cater for the requirements of consumers for liquor and related services for the following reasons.
- 54 First, the Commission rejects the general principle that merely because a business model has proven to be popular in other localities, that that justifies the grant of a new licence in this locality or any other locality. Such a contention is untenable and ignores the regulatory scheme and objects of the Act; the need to consider the merits of each case; and need to properly weigh and balance the public interest considerations in the context of each individual application.
- 55 Secondly, no evidence was presented that persons visiting the shopping centre might find it more convenient to purchase packaged liquor from the applicant's proposed store and no evidence was submitted that persons travelling along the main arterial road would find it more convenient or have any requirement to use the proposed liquor store. For example, in LC 13/2011 in which Woolworths Ltd sought the grant a liquor store licence at the Warnbro Fair Shopping Complex, it commissioned a market survey in which 409 customers of the Shopping Complex were interviewed. This evidence was given considerable weight by the Commission to demonstrate that persons attending the Shopping Complex had a requirement for one-stop-shopping and ultimately that application was approved.
- 56 Thirdly, the only other evidence of consumer demand was evidence from the Wine Club and some letters of support lodged with the local government authority. Whilst the Wine Club and the letters of support may be evidence of consumer demand as contemplated in object 5(1)(c) it is necessary for the Commission to consider what weight should be attributed to this evidence. The requirement for liquor and related services by the Wine Club members is quite unique and does not reflect or represent the broader requirements of the general community. Similarly, the letters of support submitted to the local government authority were quite general in nature, although it is noted that one or two persons did refer to the convenience of using the shopping centre and the proposed liquor store. The Commission finds that the limited nature of this evidence significantly diminishes the weight that should be accorded to it.
- 57 The material facts in *Hay Properties* are substantially different to the facts in this case. This is not an application for a typical liquor store by industry standards. What

is proposed by this applicant is to establish very large, warehouse style premises, which would be one of the largest packaged liquor outlets in the State in a locality which has a population of approximately 26,000 people and which is already well serviced by packaged liquor outlets. Although protecting the market share of existing licensees is not relevant and providing competition is a legitimate public interest consideration, the evidence does not satisfactorily establish that the public in the area or elsewhere or those travelling along the main arterial road have any requirement for the services proposed by the applicant. The private interests of the applicant, which may operate a highly profitable business, should not be confused with the public interest.

- 58 The Act places a clear onus on an applicant to adduce sufficient evidence to satisfy the licensing authority that the grant of the application is in the public interest. The level and degree of evidence to be submitted by an applicant will invariably vary depending upon the facts and circumstances of each case. Whether evidence is relevant and probative depends not on the intrinsic qualities of the evidence but on what the evidence is said to prove. Based upon the facts in this application, the Commission is not satisfied that adequate or compelling evidence has been submitted to demonstrate that the grant of this licence will cater for the requirements of consumers for liquor and related services in the manner and under the circumstance contemplated by the applicant at the proposed location.
- 59 Notwithstanding that the Commission is satisfied that the grant of the application will not negatively impact on the local community, the Commission finds, however, that the applicant has failed to discharge its onus under section 38(2) of the Act and the application is therefore refused.
- 60 Prior to the commencement of the hearing before the Commission, the applicant sought some interlocutory orders in respect of the objectors, submissions of the interveners and other matters. With the consent of the parties the Commission reserved its decision on the proposed orders and as can be seen from the reasons in this decision nothing much turns on this issue. For the sake of completeness however, the Commission will briefly deal with some of these issues. The Commission confirms that the defined locality for the application is a 2 kilometre radius around the proposed site of the premises, which is in accordance with the policy of the Director of Liquor Licensing. By way of observation, and once again it is not critical to the outcome of this application, the reference to the locality in respect of an application only relates to the potential impact that the grant of the application

may have on the amenity of the locality (refer section 38(4)(b)), otherwise a reference to the locality has no limiting consideration in respect of the harm or ill-health that may result from the grant of an application or any other public interest considerations. Also, the objectors and the City of Melville did not actively participate in these proceedings other than to lodge general statements expressing opposition to the grant of the application. No evidence was presented by the objectors or the City of Melville to substantiate their claims, consequently the Commission finds that the objectors have not discharged their onus under section 73(10) which places the burden of establishing the validity of any objection on the objector.

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

JIM FREEMANTLE
CHAIRPERSON