

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

- Applicant:** Paul Jacbus Van Den Berg and Una Van Den Berg
(represented by Mr Andrew Guy of Appius
Lawyers)
- First Intervener:** Director of Liquor Licensing
- Second Intervener:** Commissioner of Police
(both interveners represented by Ms Rachel
Paljetak of State Solicitors Office)
- Third Intervener:** Executive Director Public Health
(not represented at the hearing)
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Mr Michael Egan (Member)
- Matter:** Application pursuant to section 25 of the *Liquor
Control Act 1988* for a review of a decision by the
delegate of the Director of Liquor Licensing to
refuse a grant of a liquor store licence for premises
to be known as *Kalahari Clarkson*.
- Premises:** Kalahari Clarkson
8/27 Caloundra Road
Clarkson
- Date of Hearing:** 4 March 2016
- Date of Determination:** 10 May 2016
- Determination:** The application is refused.

Authorities referred to in Determination:

- *Liquorland (Australia) Pty Ltd v Commissioner of Police (LC 18/2015)*
- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175*
- *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*
- *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142*
- *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384*
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WACA 258*

Background

- 1 On 10 July 2015, Paul Jacobus and Una Van Den Berg made an application pursuant to section 47 of the *Liquor Control Act 1988* (“the Act”) for the grant of a liquor store licence for premises to be known as “Kalahari Clarkson”, situated at 8/27 Caloundra Road Clarkson.
- 2 On 27 August 2015, the Executive Director Public Health (“EDPH”) and the Commissioner of Police (“Police”) each lodged a notice of intervention pursuant to section 69 of the Act.
- 3 Submissions and responsive submissions were subsequently lodged by the various parties during the period leading to the decision of the Delegate of the Director of Liquor Licensing (“the Director”).
- 4 On 21 December 2015, the Director refused the application.
- 5 On 20 January 2016, Paul Jacobus Van Den Berg and Una Van Den Berg (“the applicant”) lodged an application for a review of the decision pursuant to section 25 of the Act.
- 6 On 16 March 2016, the Director lodged a submission in response to review submissions lodged by the applicant.
- 7 Further submissions and responsive submissions were lodged by the applicant, the Police and the Director. The EDPH elected to rely on the written submissions that were before the Director.
- 8 A hearing before the Liquor Commission (“the Commission”) was held on 4 April 2016.

Submissions on behalf of the applicant

- 9 The applicant’s existing business at the premises specialises in the retail sale of food products originating, prepared, manufactured and mainly sourced from South Africa and the grant of a liquor store licence is sought in order to provide South African brands of alcohol to meet strong customer demand for this additional service.
- 10 The grounds for the application for review of the Director’s decision to refuse the application are:
 - a) the director erred in law by failing, after making inquiry, to deal with the application on its merits; and
 - b) the Director erred in law by identifying and speculating about offences under section 65 and section 110 of the Act as relevant issues.

- 11 The proposed licensed outlet will trade in a manner similar to an existing store in the southern suburb of Willetton and, according to the applicant, “there is extremely strong customer demand for and requests from customers to have the privilege availed of supplying South African liquor in Perth for North of the River as compared to Willetton which is 50 kilometres away”.
- 12 The proposed licensed area of the premises will be approximately 4.5 square metres comprising counter space and a small number of display cabinets – this amounts to approximately 5% of the total customer area of the existing store.
- 13 Further, as stated in the applicant’s Public Interest Assessment (“PIA”):
 - a) the (existing) business does not attract much custom or patronage from passing trade and the greater part of the services is availed to customers who deliberately attend for selected purchases;
 - b) whilst to cater for the requirements of consumers for liquor and liquor related services (section 5(1)(c) of the Act) may be in a general sense or a specific market, the applicant is seeking to provide for a specific market;
 - c) most of the business’ customers are known clients;
 - d) most customers come from north of the river and are expected to purchase authentic South African liquor known to them and which has a “nostalgic association”;
 - e) although 127 varieties of South African wine are available from the two licensed suppliers sourced by, and willing to supply, the applicant (47 varieties from a local supplier and 80 varieties from a supplier in Queensland), the proposed range of stock will be limited due to the limited licensed area and the fact “only stock that is being sought will be made available”;
 - f) alcohol will not be the main focus, but “effectively a secondary service availed for convenience and comfort of our customers”;
 - g) the liquor products will not compete with products offered by other outlets; and
 - h) the proposed premises will not pose any real risk to the community due to the limited nature of the application, the nature and style of store and the small specific market base.
- 14 As part of his investigation and deliberation, at first instance, the Director determined that the First Choice Superstore Clarkson (“FCC”), situated 800 metres from the proposed premises, already provides a range of South African liquor products and that additionally, the local WA distributor Caparius Liquor

Wholesalers also supplies relevant liquor products to five (5) licensed premises located within the 36 suburbs identified by the applicant in the PIA as comprising the City of Wanneroo. The Director then determined that rather than adding to diversity, the grant of the licence will simply duplicate existing services.

- 15 It was submitted that the Director erred in coming to this conclusion as only 2 of the 13 product varieties stocked by FCC are included in the 127 varieties that may be made available by the applicant.
- 16 Therefore, the applicant submits that the proposal could not be considered to be one that would result in a duplication of existing services. Rather, the application would add diversity to the market.
- 17 The applicant contends that the consumer demand and requirement for diversity is evidenced through the applicant's survey of existing customers, which found that 100% of the 88 respondents would purchase South African products and that only 1% found other stores satisfied their needs close by. The applicant further contends that approval of the application would be consistent with the Act's primary object of catering for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry – section 5(1)(c) of the Act.
- 18 In response to the Director's reference in his published reasons to the decision in *Liquorland (Australia) Pty Ltd v Commissioner of Police (LC 18/2015)* that the application of section 5(1)(c) of the Act is not synonymous with the unrestricted expansion of liquor outlets to satisfy a desire on the part of some consumers of liquor, or liquor related services, for a relatively insignificant or inconsequential modification or improvement to the level of convenience, the applicant submits that that decision relates to a vastly different set of circumstances. In the applicant's submission, whilst the comments in that decision make good sense when referring to actual duplication of services in the market, Liquorland is a chain store which sells generic products to a wider market base, unlike the specialist nature of the applicant's proposal.
- 19 It was submitted that in a review of the evidence in the PIA and the investigation conducted by the Director, only 1.57% of the possible varieties of South African liquor products available to the applicant are currently available in the market.
- 20 Further, it was submitted that catering to a new market in providing products that are not available currently in the market, is not an insignificant or inconsequential improvement generally and is in fact a proper development of the industry.
- 21 With regard to the second ground for the review application, it is acknowledged that sections 65(1)(c) and 110(4) of the Act create offences. However, such offences will only arise if the licensee has not, but could have, taken

reasonable steps to prevent such occurrences or that the licensed premises are in any way ill-conducted.

22 Reference was made to section 119(1) of the Act which states:

A person who consumes liquor in any place or on any premises, including a park or reserve, without the consent of the occupier, or the person or authority having control, of that place or those premises commits an offence

and submits that if the applicant gives consent to the sale of packaged liquor and consents to that packaged liquor being consumed on the premises, then no offence is committed under section 119(1) of the Act.

23 In response to a question by the Commission (prompted by the code of conduct and management plan which give an impression liquor may be served/consumed on premises), the applicant advised that it was not intended to seek a restaurant licence for the café component of the premises and that the storage/display of liquor products will be in cabinets behind the service area and not directly accessible to the public.

24 A number of conditions are put forward by the Police and the EDPH as harm minimisation measures should the Commission determine to grant the application. Most conditions have been agreed to by the applicant. However, the applicant submits:

- a) the proposed condition of the Police that all products with an alcohol content equal to or higher than 19% be contained in lockable glass cabinets is not considered a necessary requirement for secure business operations (and is not a condition applicable at most other liquor stores); and
- b) the further condition that there be no external promotions, advertising or incentives which will encourage the sale of cheap or discounted liquor or the excessive consumption of liquor is also not required as there will never be any incentives offered to encourage excessive consumption, but there will be specials, not unlike at other stores, the applicant would like to bring to the notice of customers.

25 In addition, the applicant submits that it is important to note that the Police do not wish to oppose the application, but rather have recommended certain trading conditions.

26 In summary, it was submitted that based on the evidence, the Director has not made a reasonable decision and therefore the application should be approved.

Submissions on behalf of the Director

- 27 The Director submits that an applicant seeking the grant of a liquor store licence must satisfy the Commission that granting the application is in the public interest (section 38(2) of the Act) and that in this regard the applicant has failed to discharge its onus due to the following factors:
- a) the absence of probative evidence in support of a consumer requirement for the application;
 - b) the number of existing liquor outlets in the locality of the premises that already sell South African liquor; and
 - c) the proposed licence is not consistent with the proper development of the liquor industry.
- 28 As prescribed by section 5(1)(c) of the Act, an applicant for a licence should address the issue whether proposed development will cater for the requirements of consumers for liquor and related services to demonstrate that the granting of the application is in the public interest.
- 29 As is further demonstrated by the second reading speech which accompanied the introduction of the *Liquor and Gaming Legislation Amendment Act 2006* (WA), it is not sufficient merely to assume that the supply of liquor will be in the public interest. Rather, as the Minister acknowledged at the time, “the proliferation of liquor outlets is not an outcome that would be supported by the public interest test”.
- 30 It follows that the extent to which a particular consumer requirement is already being met in the locality of the proposed licensed premises is a relevant consideration for determining whether the grant of a further licence will result in benefits that might be said to be in the public interest.
- 31 Further, the Director submits that the negative aspects associated with the additional licence are likely to be more significant than the negative aspects associated with an already existing licence. This is for the reason that the proliferation of liquor outlets results in the increased availability of liquor which further leads to increases in consumption and consequently harm of ill-health.
- 32 In support of its submission that there is a requirement for South African liquor products in the locality of the premises the applicant:
- a) provided a consumer survey completed by 88 customers as evidence of an “extremely strong customer demand” for South African liquor;
 - b) referred to population data that shows that South Africa is the third most prevalent ethnicity in the suburb of Clarkson, and that the South African population in Western Australia generally is growing; and

- c) referred to the fact that there is no specialist South African liquor store to service customers who reside north of the Swan River.
- 33 It was submitted that in respect of consumer surveys generally, the Commission has previously found that petitions, surveys and social media interactions have little probative value and should be treated with a degree of caution and in respect of the consumer survey in relation to this application, little or no weight should be given to the survey for the following reasons:
- a) the survey does not ask respondents whether they are able to purchase South African liquor products from other liquor outlets generally, but only directs respondents to consider whether there is another South African specialist store close by;
 - b) the survey only asks respondents if they live north or south of the Swan River, which makes it impossible to determine how close or far respondents reside in relation to the premises;
 - c) it does not appear that respondents were provided with any information at the time of completing the consumer survey about the various factors that the Act requires must be considered; and
 - d) it appears that only pre-existing customers were asked to complete the consumer survey with the result that the consumer survey does not represent cogent evidence of a broader community demand.
- 34 Taken at its highest, the consumer survey demonstrates that respondents, being pre-existing customers of the premises, would find it convenient to be able to purchase South African liquor products whilst purchasing South African grocery products at the premises. However, the convenience of purchasing liquor products with other grocery items in the same store is not, of itself, a persuasive factor in demonstrating consumer requirement. In LC 18/2015 (supra) the Commission stated:
- A liquor outlet at every corner delicatessen or beside every supermarket or regularly visited retail outlet to satisfy the convenience of some members of the public is not what the community would countenance or expect, and would not be, in the Commission's view, in accordance with the provisions and intent of the Act*
- 35 It is also important to distinguish between public interest and private interests and the Commission has previously found that licences should not be granted simply because an applicant has a good idea or would like to establish a business involving the sale and supply of liquor.
- 36 With respect to the population data relied upon in the application, the applicant has not provided any evidence to establish a correlation between the alleged

rise in residents of South African origin in the population and a consumer demand for South African liquor products in the locality of the premises.

- 37 In this regard, the applicant bears the onus of demonstrating how the grant of the licence is justified on the basis of a broader consumer requirement, and not merely how the licence will benefit a select group of the community.
- 38 The Director therefore submits that the applicant has failed to produce sufficient, probative evidence to satisfy the Commission that there is a consumer requirement for South African liquor in the locality of the premises.
- 39 With regard to the number of existing liquor outlets in the locality of the premises that already sell South African liquor, the Director undertook his own investigations to determine the extent to which demand for South African liquor is presently being met by other liquor stores, not only in Clarkson, but in some of the other 36 suburbs identified by the applicant in the PIA.
- 40 At least 5 of the licensed premises within the 36 suburbs identified in the PIA received South African liquor supplies from Cuparius Liquor Wholesalers, with First Choice Superstore Clarkson selling a range of 13 South African wines.
- 41 It was submitted that in circumstances where there already exists licensed premises that meet the alleged consumer requirement for South African liquor products, any additional benefit arising from this application would be attributed to convenience to existing customers. This level of convenience to a select group of the community does not, of itself, satisfy the primary and secondary objects of the Act, nor does it demonstrate that the application is in the public interest.
- 42 For the reasons outlined, the applicant has failed to produce sufficient evidence to satisfy the Commission that there is a consumer requirement for South African liquor products, particularly when considering section 5(1)(c) of the Act in the context of the proper development of the liquor industry.
- 43 It was submitted that the application is contrary to the proper development of the liquor industry for two reasons:
 - a) any additional benefit offered by the licensing of the premises will be limited to offering some increased convenience to existing customers;
 - b) the applicant currently operates a restaurant/café and also sells a number of South African grocery products from the premises which will, with the integration of liquor products in premises set up for dining, send a confusing message and has the potential to encourage customers to consume alcohol on the premises - this potential is made more real by the applicant's proposal to offer tastings of South African liquor products on the premises.

- 44 Any drinking of alcohol on the premises may lead to a contravention of section 65(1)(c) of the Act which provides that the sale of packaged liquor or of liquor for consumption off the premises:

Shall not, unless an extended trading permit or a special facility licence so authorised, be or permitted to be consumed on or, except in the case of wine sold under section 55, in the immediate proximity of the licensed premises, and a person who contravenes such a condition commits an offence.

- 45 It was submitted that it is proper for the Director, and now the Commission, to consider whether the application has the potential to violate any of the controls and restrictions in the Act. Therefore, the Director did not err by taking account of the potential for breaches of the Act to occur if the application was granted.
- 46 In conclusion, it was submitted that the applicant has failed to demonstrate how the grant of the application is in the public interest beyond establishing that there is some additional benefit in convenience to the applicant's existing customers rather than in the public interest more generally.

Submissions on behalf of the Commissioner of Police

- 47 The Police have intervened on the following grounds:
- a) on the question of whether, if a particular application is granted, public disorder or disturbance would likely result – section 69(6)(c)(ii) of the Act; and
 - b) any other matter relevant to the public interest – section 69(6)(c)(iv) of the Act.
- 48 In summary, the Police representations are as follows:
- a) the consumer survey submitted by the applicant in support of the application has minimal probative value;
 - b) the grant of the application in the locality of the premises without conditions will add to the existing harm in the locality; and
 - c) although it is for the Commission to decide if such harm outweighs any potential benefits in granting the liquor licence, if the application is granted, it is submitted that the licence should be made subject to conditions to assist in the minimisation of harm and anti-social behaviour.
- 49 With regard to the applicant's consumer survey, the Police rely upon the evidence provided on behalf of the Director – paragraph 33 above.

- 50 The Police have provided extensive submissions on pre-existing alcohol related harm and the presence of at-risk groups in the suburb of Clarkson including that:
- a) according to the Police Incident Management System (IMS) data, alcohol was a contributing factor in 31% of reported domestic assaults in 2014, with this figure increasing to 36% in the period covering January 2015 to August 2015 and was a contributing factor to 60% of reported domestic violence incidents in 2014 and 27% of domestic violence incidents in the period covering January 2015 to August 2015;
 - b) according to Computer Aided Dispatcher System (CAD) data, Police received a significantly higher number of calls for assistance in Clarkson in respect of domestic related and disturbance/public disorder matters in the period commencing January 2014 and ending August 2015, as compared to calls received in the neighbouring suburb of Mindarie in the same period;
 - c) domestic violence incidents are widely known to be under-reported in the community, with the result that the actual number of domestic violence incidents in Clarkson is likely to be much higher than shown in the IMS and CAD data notwithstanding the fact that the data already demonstrates a significant level of domestic violence incidents in Clarkson;
 - d) there is a causation connection between packaged liquor outlets and alcohol related harm, including domestic violence; and
 - e) Aboriginal people and juveniles are two at-risk groups that reside in the locality of the premises at levels generally comparable to national averages, and recent investigations by Police in other suburbs of Perth show that these groups represent a very high percentage of thefts from packaged liquor outlets.
- 51 In the light of this evidence the Police invite the Commission to find that there is a high level of existing alcohol related harm within the locality and that the grant of the application, where there is already a significant issue concerning incidents of alcohol related domestic violence in the presence of two at risk groups will, in all likelihood, create an elevated risk of alcohol related harm and other anti-social disturbances.
- 52 It was submitted that while the elevation in the degree of harm is unlikely to be significant due to the limited manner and style of the trade proposed by the applicant, appropriate conditions need to be fixed on any grant of the licence to ensure that any increase in harm, ill-health and other anti-social disturbances may be minimised.

53 The conditions proposed by the Police are:

a) Trading Hours:

the licensee is permitted to trade as follows:

- 1) 8:00am to 5:00pm Monday, Tuesday, Wednesday, Friday and Saturday;
- 2) 8:00am to 9:00pm Thursday;
- 3) 10:00am to 3:00pm Sunday.

b) Product range (as per application);

the applicant is permitted to sell and supply South African liquor products only.

c) Lockable glass cabinets;

all spirits and alcohol equal or higher than nineteen percent (19%) alcohol per volume be displayed behind lockable glass cabinets and accessible only by authorised staff.

d) Signage;

signage is to be placed in all service areas that state the following:

Pursuant to the *Liquor Control Act 1998*, it is an offence to:

- 1) sell liquor to a drunken person;
- 2) aid a drunken person in obtaining or consuming liquor;
- 3) supply liquor to a juvenile on licensed or regulated premises.

e) Advertising;

no external promotions, advertising or incentives which encourage the sale of cheap or discounted liquor or which encourages excessive consumption.

f) Close Circuit Television (CCTV);

- 1) a system is to be in place and operational at the times covering the internal access/egress of each entrance and exit of the premises;
- 2) these cameras must allow clear identification of patrons;
- 3) staff members to be fully trained in the operation of the system;
- 4) the system must comply with the Director's Policy relating to CCTV; and

- 5) images recorded via the CCTV system must be retained for twenty eight (28) days and must be made available for viewing or removal by the Police or other persons authorised by the Director.

g) Dress Standards;

the licensee must refuse entry to the licensed area to any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other items which indicates membership or association with Outlaw Motorcycle Gangs, including but not limited to the following:

- 1) Coffin Cheaters;
- 2) Club Deroes;
- 3) Gods Garbage;
- 4) Gypsy Jokers;
- 5) Outlaws;
- 6) Finks;
- 7) Rebels;
- 8) Comancheroes;
- 9) Hell's Angels;
- 10) Rock Machine;
- 11) Mongols.

A notice of these conditions is to be clearly displayed at each entry point of the licensed premises.

Submissions by the Executive Director Public Health (“EDPH”)

- 54 The EDPH relies on the written submissions that were before the Director as part of the EDPH intervention when the Director determined the application.
- 55 The purpose of the EDPH intervention is to make representation regarding:
 - a) the harm and ill-health concerns indicated by the literature regarding integration of the alcohol sales alongside everyday grocery items; and
 - b) trading conditions that may assist to minimise alcohol-related harm, if the licence is granted by:
 - 1) ensuring that liquor products are separated from grocery products available for purchase at the premises; and
 - 2) supporting the applicant’s proposed and intended manner of operation to be maintained both now and in the future.

- 56 It was submitted that the key concerns in the intervention relating to harm and ill-health are:
- a) research shows that the sale of alcohol from supermarkets can lead to increased consumption and harm;
 - b) placement alongside everyday grocery items can reinforce alcohol as a non-harmful product and establish its cultural place as part of everyday life, shaping attitudes and behaviours towards alcohol;
 - c) the sale of alcohol from a supermarket could lead to purchases of alcohol that would not have otherwise occurred, known as impulse purchasing, leading to increased consumption.
- 57 It was submitted that supermarket studies in New Zealand and Sweden found that:
- a) the increased availability of table wine in grocery stores in New Zealand was associated with significantly increased wine consumption; and similarly
 - b) in Sweden, consumption and harm increased when beer was sold from grocery stores and fell when the practice ceased.
- 58 Further, unlike dedicated liquor outlets, supermarkets are generally frequented by a broader proportion of the population because of daily 'need' type products for sale. Supermarkets selling liquor therefore increase the potential reach of alcohol-related harm, given the regularity of exposure to the sale and promotion of alcohol that occurs.
- 59 Introducing liquor into a grocery supermarket environment, particularly without conditions, could impact on community attitudes, such that alcohol is seen as a normal everyday commodity similar to food items.
- 60 The EDPH acknowledges that the applicant's proposal to have only a limited product range may reduce the potential for unplanned purchasing, which is a positive harm minimisation strategy, and that limiting the display of liquor products to the area behind the service counter may also reduce impulse purchasing and the potential associated harms.
- 61 In summary, it was submitted that if the licence is granted, the conditions suggested in the intervention are consistent with a harm minimisation approach to reduce the impact of alcohol related harm of ill-health, and reflect the applicant's proposed and intended manner of operation.

Determination

- 62 Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 63 On a review under section 25 of the Act, the Commission may –
- a) *affirm, vary or quash the decision subject to the review;*
 - b) *make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance;*
 - c) *give directions –*
 - 1) *as to any question of law, reviewed; or*
 - 2) *to the Director, to which effect shall be given; and*
 - d) *make any incidental or ancillary order.*
- 64 Further, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health [2008] WASC 224*).
- 65 Pursuant to section 38(2) of the Act, an applicant for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest.
- 66 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 67 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment 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] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:
- 1) *“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.*

- 2) *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.”*

68 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer Palace Securities Ltd supra). The primary objects of the Act are:

- 1) to regulate the sale, supply and consumption of liquor; and
- 2) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- 3) to cater for the requirements of consumers of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

69 The Commission is also required to have regard to the secondary objects of the Act, the most pertinent of which, in the context of this application, is section 5(2)(a), namely:

...

to facilitate the use and development of licensed premises, including their use and development for the performance of live original music, reflecting the diversity of requirements of consumers in the State;

70 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384 [32]*:

- 1) *“[Section] 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. 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 to make those objects the exclusive consideration nor the sole determinants of the public interest”.*

71 Each application must be considered on its merits and determined on the balance of probabilities pursuant to 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 minimising 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] WACA 258*).

- 72 The applicant is seeking a liquor store licence to offer exclusively South African liquor products in association with South African groceries currently being sold to the public at the premises.
- 73 The applicant also operates an unlicensed café/restaurant on the premises immediately adjacent to the area from which the groceries are sold and the proposed liquor products are intended to be sold.
- 74 The applicant has submitted statistical data showing that, at the 2006 Census, there were 22,050 South African born residents living in Perth, now estimated to have increased to 30,291.
- 75 Population figures accessed by the applicant from the City of Wanneroo show that in 2011 there were 369 residents of South African origin living in the suburb of Clarkson out of a total population of 12,000. This number has increased from 105 in 2006 and places South African third (after United Kingdom and New Zealand) in the list of countries providing overseas born residents living in Clarkson.
- 76 To demonstrate the customer requirement for South African liquor products, the applicant conducted a survey of existing customers of the currently operating grocery store component of the business. A total of 88 customers responded to the survey, all of whom indicated that they will purchase South African alcohol (as part of the applicant's total service) and that the proposal would provide "one stop convenience". All respondents indicated they reside north of the River and that they could not see any negative affect on the amenity of the area should the licence be granted. Furthermore, all respondents responded "no" to the question: "Is there another South African specialist store to satisfy your needs close by?" These various responses reflect the full extent of the questions contained within the survey.
- 77 Both the Director and the Police have questioned the veracity of the customer survey as it did not require a respondent to provide an appropriate level of specific information identifying where the respondent resides, and therefore, has failed to identify whether any of the respondents reside in the immediate locality of the premises.
- 78 The Director also submitted that the applicant has not provided any evidence to establish a correlation between the rise in the number of members of the community of South African origin within the population of Western Australia and a consumer demand for South African liquor products.
- 79 The survey is clearly deficient in a number of important respects and could not be said to be a representative view of members of the local community within the defined locality, or even, for that matter, of the broader community residing

“north of the river”. It is not even known what proportion of the stated 369 residents of South African origin living in the suburb of Clarkson support the application or what proportion of the existing store’s customer base (i.e., other than the customers who completed the survey) support the application.

- 80 Further, whilst in general terms respondents have indicated a willingness to purchase alcohol at the premises and that there is not a specialist store to satisfy their needs close by, the specific liquor requirements of the respondents are not known, the extent to which their requirements are not currently being satisfied is not known, the extent to which their requirements would be satisfied if the application were granted is not known or is not known with any precision, and the level of inconvenience they are currently experiencing is also not known.
- 81 It is understandable and not unexpected that customers of a grocery store would express support for an expansion of the retail offering to include liquor products. However, the applicant must demonstrate the grant of the application is in the public interest, not simply that it may satisfy their customers’ needs or preferences.
- 82 Convenience is also just one factor when considering the requirement of consumers of liquor and as was observed by the Commission in a previous decision (LC 18/2015 *supra*), a liquor store at every supermarket or regularly visited retail outlet to satisfy the convenience of some members of the public would not be, in the Commission’s view, in accordance with the provisions and intent of the Act.
- 83 The applicant has submitted that there are approximately 127 varieties of South African liquor products available through different wholesaler distributors which will be accessed to provide a greater diversity of product and choice; however, no evidence is provided that there is an unmet requirement for the variety of liquor proposed to be made available beyond the general statement that “only stock that is being sought will be made available”. In addition, the applicant has stated that the stock to be held would not be great due to the actual size of the licensed area proposed and the manner and style of trade.
- 84 The applicant therefore, has not clearly demonstrated to what degree the granting of this application will contribute to meeting a consumer requirement beyond that already being provided for within the locality and more broadly across the northern suburbs referred to in the application.
- 85 Ultimately, the Commission is of the view there is insufficient evidence to show that the current availability of South African liquor products in the locality is not meeting consumer requirements, albeit that there may be some specific products not readily available to a small section of the community.
- 86 Furthermore, the Commission is not satisfied that any increase in diversity has been demonstrated to the requisite degree. Alternatively, to the extent diversity

could be said to increase with the grant of the application, the Commission does not consider such diversity overrides or takes precedence over the Commission's finding that the applicant has not demonstrated the application, if granted, will cater for the requirements of consumers of liquor or liquor related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

- 87 The manner in which the applicant's proposes to operate a grocery store, a liquor store and a café/restaurant on the same premises has presented some uncertainties, particularly in relation to section 65(1)(c) of the Act which prohibits the sale of packaged liquor for consumption off the premises (as applies to a liquor store licence) to be consumed on the premises.
- 88 At the Commission hearing, the applicant submitted that section 119(1) of the Act would allow packaged liquor to be consumed on the premises provided the occupier or person or authority in control gives consent. In the Commission's view, this is an incorrect interpretation of the Act as section 119(1) refers to unlicensed premises, not licensed premises as would be the case if the liquor store licence was granted.
- 89 This uncertainty may be a product of the fact the application is for a small portion of the existing premises to be licensed and as is stated by the applicant in the PIA the application is not for what can be described as a "full" liquor store but only a small version of such and possibly if approved, "the smallest liquor store in the State". Nevertheless, the applicant should be clear about the operational and regulatory requirements relevant to the proposed premises.
- 90 As was correctly and appropriately pointed out by the Director in his decision, a breach of section 65(1)(c) of the Act and similarly section 110(4) of the Act would result in an offence being committed.
- 91 The fact that the applicant has entered into the debate on on-premises consumption of alcohol clouds the issue of operational intent, particularly as the code of conduct and management plan submitted with the PIA each indicate an approach consistent with on-premises consumption.
- 92 The operational relationship between the grocery and liquor components of the premises was clarified during the Commission hearing in that the storage/display cabinets would be placed behind the service counter and therefore liquor would not be directly accessible to the public. It was submitted by the applicant that this positioning should obviate any need to place liquor products in a lockable glass cabinet as proposed by the Police.
- 93 Both the Police and the EDPH in particular, have expressed concerns as to the positioning of alcohol products alongside everyday grocery items, which, it was stated, can encourage impulse or unplanned purchasing and also, culturally, present alcohol as a non-harmful product given its visual association with the respective grocery items.

- 94 The applicant has indicated that it is amenable to a condition on the licence requiring a separation of liquor and grocery products - this is addressed by the proposed positioning of the display/storage cabinets which would only hold liquor products.
- 95 Further, during the hearing the applicant advised that it was not intended to apply for a restaurant licence for the café/restaurant area of the premises, however, the application presents an inconsistent approach to the proposed method of operation and integration of the different components of the business to be conducted on the premises.
- 96 In the Commission's view, this aspect of the application suggests that insufficient consideration has been given to the regulatory requirements and the associated impacts that will apply to the proposed operation of the business.
- 97 Police data indicates that there is a high level of existing alcohol related harm within the locality, with significant issues concerning incidents of alcohol related domestic violence and in addition, the presence of two at-risk groups.
- 98 The Police have, however, acknowledged that whilst the elevation in the degree of harm is unlikely to be significant due to the limited manner and style of trade proposed, appropriate conditions need to be applied, should the application be granted, to ensure that any increase in harm, ill-health and other anti-social disturbances may be minimised.
- 99 Similarly the EDPH was concerned that, should the application be granted, appropriate harm minimisation conditions be imposed on the licence, as follows:
- a) liquor sales are restricted to South African liquor products only;
 - b) the liquor is to be located behind the service counter only;
 - c) there is to be no advertising of liquor on the external facades of the premises.
- 100 The Commission accepts that the harm and ill-health aspects of the application can be adequately addressed by the application of harm minimisation conditions being imposed on the licence, if granted.
- 101 In summary, the evidence before the Commission indicates that the interests of a very small section of the community will be served by the granting of this application, namely a segment of the existing customer base of the applicant's existing store, and potentially other South African born residents within the suburbs specified by the applicant.

- 102 Whilst the Commission acknowledges that the potential customer base may extend beyond members of the community of South African origin, it is clear the application is primarily directed towards that sector.
- 103 In the Commission's view, a measured approach is required to the consideration of the broader public interest and in determining whether the grant of the application will contribute to the proper development of the liquor industry, the tourism industry and other hospitality industries in the state
- 104 This application, whilst identifying a particular market segment that will respond to a specialised product range, has not clearly established the extent of the market or the demand, nor has it clarified the level of current availability of such products from existing liquor outlets.
- 105 As has previously been stated, the convenience factor itself for a select group of customers is not sufficient on its own to justify the granting of a liquor licence and without specific information on the liquor product items being sought by customers or potential customers, or whether these items are currently available elsewhere in the suburbs listed in the application, the Commission is not persuaded that the granting of the application is in the public interest.
- 106 Although the Commission accepts that the harm and ill-health aspects of the application can be adequately addressed by imposing the harm minimisation conditions proposed by the Police and EDPH, in considering the material that was before the Director when making the decision to refuse the application and following further submissions from the applicant and the Police and EDPH (both in written form and in presentations at the Commission hearing) the Commission is not persuaded that the applicant has discharged its onus under section 38(2) of the Act .
- 107 The decision of the Delegate Director of Liquor Licensing is therefore affirmed and the application is refused.



EDDIE WATLING
DEPUTY CHAIRPERSON