

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: ML Liquor Store Pty Ltd
(represented by Mr Andrew Websdane of Frichot & Frichot Lawyers)

Intervener: Commissioner of Police
(represented by Mr Nicholas van Hattem of State Solicitor's Office)

Objector: Dolten Pty Ltd
(represented by Mr Stephen Butcher of Dwyer Durack Lawyers)

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Mr Greg Joyce (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the Director of Liquor Licensing to refuse an application for a liquor store licence.

Premises: Second Avenue Fine Wines
755 Beaufort Street, Mt Lawley

Date of Determination: 27 May 2013

Determination: The application is refused.

Authorities referred to in the determination:

- *Coles Myer Limited v Liquorland Noranda (unreported Supreme Court, WA, Library H267, 28 May 1990)*
- *Hay Properties Pty Ltd and anor v Roshel Pty Ltd, unreported; FCt SCt of WA; Library No 980496; 20 July 1998*
- *Hancock v Executive Director Public Health [2008] WASC 224*
- *Woolworths Ltd v Director Liquor Licensing [2012] WASC 384*
- *Busswater Pty Ltd v Director Liquor Licensing (LC 17/2010)*
- *Element WA Pty Ltd v Director Liquor Licensing (LC 32/2010)*
- *Harold Thomas James Blakey v Director Liquor Licensing (LC 44/2010)*
- *Shallcross Investments Pty Ltd v Director Liquor Licensing (LC 26/2010)*
- *Topsouth Holdings Pty Ltd v Director Liquor Licensing (LC 51/2011)*
- *Charlie Carter Pty Ltd v Streeter & Male (1991) 4 WAR 1*
- *Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd [1991] FCt SCt of WA 169*
- *Re Minster 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*
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WACA 258*

Background

- 1 On 23 April 2012, ML Liquor Store Pty Ltd (“the applicant”) lodged an application for the conditional grant of a liquor store licence for premises to be known as Second Avenue Fine Wines (“the premises”) situated at Shop 4, 755 Beaufort Street, Mt Lawley.
- 2 On 28 May 2012, a notice of intervention was lodged by the delegate of the Commissioner of Police (“the Police”) pursuant to sections 3(6) and 69(6)(c)(ii) and (iv) of the *Liquor Control Act (1988)* (“the Act”) for the purpose of making representations in respect of the application.
- 3 On 14 June 2012, a notice of objection was lodged by Dolten Pty Ltd (“the objector”) opposing the application. The objector is the owner of the property that is tenanted by Liquorland Express situated at 760 Beaufort Street, Mt Lawley opposite the proposed premises.
- 4 On 13 July 2012, the Department of Racing, Gaming and Liquor (“the Department”) invited the applicant to provide sufficient objective evidence to support the findings in its Public Interest Assessment (“the PIA”). The letter said;

“Under the Act the onus is on the Applicant to establish that on a balance of probabilities, the grant of the application is in the public interest. In this regard, while I note your Public Interest Assessment (PIA) submissions lodged appear to address some of these matters prescribed in section 38(4) of the Act, you may wish to give consideration to recent precedent decisions of the Liquor Commission, where it was determined that the PIA must be supported by objective evidence.”
- 5 On 13 July 2012, the applicant lodged with the Department, 21 questionnaires relating to consumer demand which were obtained between 23 May and 13 June 2012.
- 6 On 17 January 2013, the delegate of the Director of Liquor Licensing (“the Director”) determined the application on the papers and, in decision no. A221407 (“the Decision”) refused the application on the basis that the applicant had not discharged its onus of showing that the application was in the public interest under section 38(2) of the Act.
- 7 On 25 January 2013, the applicant lodged an application to the Liquor Commission (“the Commission”) for a review of the decision of the Director pursuant to section 25 of the Act.
- 8 A hearing of the matter was conducted by the Commission on 11 April 2013.

Submissions on behalf of the applicant

- 9 The applicant submitted, through its various documents and at the hearing, that the application for a liquor store licence was in the public interest as the liquor store will benefit the local community as it is situated on a major road and is part of a shopping centre and will provide ‘one stop shopping’ opportunities for shoppers. This needs to be contrasted with existing liquor stores in the locality which are primarily free standing

and do not provide the same level of convenience.

- 10 Furthermore the proposed liquor store will be modest in size and concentrate on quality liquor products. It will carry a range of quality beer, wine and spirits including a select range of quality wines.
- 11 "Locality" has been defined in the PIA in terms of the Director's guidelines as a two kilometre radius from the proposed premises and includes the following suburbs; Mt Lawley, Highgate, Inglewood and Menora. Beaufort Street experiences average weekday traffic of 26,910 vehicles and the suburbs above have a combined population of 27,445 persons.
- 12 The applicant provided 21 questionnaires of consumer demand to demonstrate the requirements and expectations of consumers in the locality. A full analysis and summary of these questionnaires was provided by the applicant at the hearing.
- 13 The grant of the liquor store licence is not likely to cause harm or ill health to people due to the use of liquor. There are no 'at risk' groups or other sub-communities within the locality who might be adversely affected.
- 14 The grant of a liquor store licence is not likely to have a negative impact on the amenity of the locality or cause undue offence, annoyance, disturbance or inconvenience to any person who resides or works in the area. The applicant's operations will be governed by conditions contained in the development approval granted by the City of Stirling.
- 15 The Executive Director of Public Health has not intervened or objected to this application.

Submissions on behalf of the objector

- 16 The objector submitted that the applicant had not demonstrated that the application was in the public interest as the applicant did not produce any evidence supporting consumer demand for the licence. The objector cited the analysis of the Director contained in his decision. There are 22,659 persons over the age of 18 living in the locality and the applicant has confined itself to the evidence contained in 21 questionnaires.
- 17 The objector cited several previous Commission cases which were dismissed due to insufficient evidence of consumer demand in respect of section 5(1)(c) of the Act.
- 18 The locality presently has a sufficient number of liquor licences including 11 liquor stores. The existing Liquorland Express is opposite the new shopping centre and can cater for consumer requirements including the 'one stop shopping' concept.
- 19 The applicant has failed properly to consult with stakeholders and consumers in the locality.

- 20 The potential for harm and ill-health must be taken into account and the objector named numerous sensitive premises within the locality that would be adversely affected by the grant of a licence. These included schools and the Youth Justice Service Office which provides a range of services for young offenders.
- 21 The objector raised the issue of the proliferation of liquor licences within the context of the then Minister for Racing and Gaming's second reading speech when the public interest test was legislated and argued that the grant of the subject licence would cause proliferation (see *Parliamentary Debates, WA Parliament, vol 409, p 6342*).

Submissions on behalf of the Commissioner of Police

- 22 The Police submitted that the applicant had not met the public interest test. It has failed to liaise with the local community in a meaningful way to gain public support.
- 23 Given the existence of Liquorland Express in the immediate vicinity there are concerns that two competing liquor outlets will produce price competition and the promotion of cheap liquor.
- 24 It is of concern that families can purchase liquor at the same place they purchase essential food items and 'at risk' groups will purchase liquor before basic food and clothing needs.
- 25 In regard to the 21 questionnaires only 6 respondents lived in the locality. Of those 6, one did not find access convenient and one did not declare purchases of liquor or nominate any liquor outlets where she regularly purchases packaged liquor.
- 26 Between March 2011 and April 2012 there were 716 reported crimes in the suburb of Mt Lawley. Of these, 42 were attributed to the use of alcohol. These criminal offences predominantly relate to assaults, disturbances and anti-social behaviour which put at risk both persons in the area and persons frequenting the vicinity of the proposed premises.
- 27 Police attendances in Mt Lawley relating to anti-social behaviour and disturbances for the period March 2011 and April 2012 totalled 884 and of these 69 occurred within a 250 metre radius of the proposed liquor store.
- 28 The Police raised the issue of outlet density and its adverse impact indicating there were 30 existing licensed premises in the suburb of Mt Lawley including 5 liquor stores. The issue of outlet proliferation was also raised.
- 29 It is wrong for the applicant to raise the issue of uniqueness given that there is a similar facility in North Perth that offers 'one stop shopping'.

Responsive submissions on behalf of the applicant

- 30 In respect of the objector's submissions the applicant made the following points:

- a) The objector is the landlord of Liquorland Express Mt Lawley which is directly opposite the proposed premises and as such has an interest to protect this existing liquor store from a potential competitor. This is a commercial interest and should be given little weight in the public interest assessment.
- b) The objector identifies three schools, the Drug and Alcohol Office and other facilities in the locality without raising any specific evidence as to the potential risk this application may pose. Most of these facilities are a long way from the proposed premises.
- c) The objector argues that the locality is already well served by existing licensed outlets. This is not a valid basis for an objection and is reminiscent of the superseded needs test.

31 In respect of the Police submissions the applicant argues:

- a) The intervention mistakenly states that there is no evidence of consumer demand. A detailed analysis of the questionnaires was provided as evidence of consumer demand.
- b) The requirements of the public for liquor facilities may be proven by inference from the evidence of a representative sample of a relevant section of the population of the locality. *Coles Myer Limited v Liquorland Noranda (unreported Supreme Court, WA, Library H267, 28 May 1990, per Rowland J at 8; per Nicholson J at 5).*
- c) It has long been accepted in this jurisdiction that an applicant for a liquor licence is not required to lodge evidence of consumer demand in a specific format, with there being no particular requirement to lodge survey evidence. (*Hay Properties Pty Ltd and anor v Roshel Pty Ltd, unreported; FCt SCt of WA; Library No 980496; 20 July 1998 per Malcolm CJ*)
- d) The proximity of the existing Liquorland Express Mt Lawley is not a public interest consideration.
- e) The police data reveals that the existing levels of alcohol related crime in the locality are relatively low and there is little or no risk that the granting of the licence would significantly increase these existing levels of harm or ill-health.
- f) Outlet density is not the test for the grant of a new licence, and is not on its own a bar to the grant of a licence.

Determination

32 In determining the matter, section 25(2c) requires the Commission to have regard only to the material that was before the Director when making the decision. In this regard the Director has given the Commission a list of material he considered.

33 The Commission is guided by the principle established by Martin CJ in *Hancock v Executive Director Public Health* [2008] WASC 224 [52,53] in that by conducting a review under section 25 of the Act it is not constrained by finding error by the Director but is to undertake a full review of the materials before the Director and make its own determination based on that review.

34 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]:

“[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”.

35 Pursuant to section 38(2) of the Act the onus is on the applicant to satisfy the Commission that granting the application is in the public interest. Section 38(4) (without limiting section 38(2)) sets out matters to which the licensing authority may have regard in determining whether granting an application is in the public interest.

36 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 Minster 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:

“The reference to “the public interest” appears in the 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.”

37 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 minimise 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.

38 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*).

39 As noted by the Commission in *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010)

“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 a community (refer Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342). In determining the positive aspects of an application, mere opinions expressed by an applicant as to the perceived benefits of the grant of their application, in the absence of supporting evidence, falls well short of the level of evidence required to substantiate such a claim. In addition, letters of support from business people purporting to speak on behalf of consumers simply does not go far enough to satisfy the Commission that the general public has a requirement for liquor and related services in the manner proposed by the applicant (object 5(1)(c) of the Act). Statements by applicants, without supporting evidence, cannot be construed as facts.”

40 The Director also provides useful guidance contained in a published document entitled “Public Interest Assessment pursuant to section 38 of the *Liquor Control Act 1988*”.

41 During the preparatory process of the subject application, the Department wrote to the applicant on 23 July 2012 expressing concerns that there was not sufficient objective evidence of consumer demand (see paragraph 4 above). The applicant provided 21 completed questionnaires of consumer demand. The results of these questionnaires have been thoroughly analysed by the applicant and a summary provided to the Commission.

42 The Commission does not consider that these questionnaires together with the

contents of the PIA have sufficient probative value for the applicant to discharge its onus of showing sufficient consumer demand in the locality. Beaufort Street has an estimated daily traffic flow of 26,910 vehicles and the locality has a population of 27,445 persons. Given these statistics the Commission has difficulty in accepting the evidence provided as representative of sufficient consumer requirement for another liquor store licence in the locality. Of the 21 questionnaires provided only 6 respondents lived in the locality and one of those did not find access convenient and one did not declare purchases of liquor or nominate any liquor outlets from which she purchases liquor. The Commission was not advised on how and where the questionnaires were carried out and cannot accept that the results demonstrate any requirement for this outlet.

43 During the hearing the applicant provided case material in respect of assessing consumer demand and the Commission has carefully considered these cases. All three cases that were cited concerned judicial comment on the repealed sections of the Act and in respect of circumstances different from the current matter but do provide guidance on aspects of consumer demand:

- In *Charlie Carter Pty Ltd v Streeter & Male (1991) 4 WAR 1 at 9-10* Malcolm CJ said *“The requirements of the public in the affected area for liquor facilities may be proved by inference from the evidence of a representative sample of a relevant section of the population of the affected area: see Coles Myers Ltd v Liquorland Noranda (unreported Supreme Court, WA, Library No 8267, 28 May 1990) per Rowland J at 8 and Nicholson J at 5.*
- In *Hay Properties Pty Ltd and anor v Roshel Pty Ltd, unreported; FCt SCt of WA; Library No 980496; 20 July 1998* Malcolm CJ said *“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 and the affected area and a range of other circumstances. In my opinion it is not a question of law.”*
- In *Baroque Holdings Pty Ltd v AlJohn (1982) Pty Ltd Appeal No. 169 of 1991* at page 12 Ipp J said *“Therefore the significance of a particular section of the public concerned is not to be determined on a mere arithmetic basis by measuring the numbers of the section concerned and comparing them to the numbers in the affected area. Each case has to be considered on its own merits and it is not possible to lay down all possible criteria.”*

44 However, it is the Commission’s view that the questionnaires evidence could not by any stretch of the imagination be considered to be representative or of sufficient size from which to draw properly based conclusions.

45 Overall the Commission finds that the applicant has failed to discharge its onus under section 38(2) of the Act to provide evidence which is sufficient to demonstrate that granting the application is in the public interest and the application is therefore refused.

A handwritten signature in black ink, consisting of a cursive 'J' followed by 'F', 'M', 'F', and 'M', with a large flourish at the end.

MR JIM FREEMANTLE
CHAIRPERSON