

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Woolworths Limited
(represented by Mr Gavin Crocket and Ms Susan Nicholson of Cullen Babington McLeod, formerly GD Crocket and Co)

Intervener: Commissioner of Police
(represented by Mr Peter Spragg of State Solicitor's Office)

Objectors: Greystone Holdings Pty Ltd
(represented by Mr Burditt Krost of Strategic Planning Institute Pty Ltd)

Ms Eva Marjanovic

Mr Robert and Ms Janet Atkins

Ms Jaqueline Denise Joyce

Mr Luke Terrence Reilly

Ms Jennifer Anne Trevenen

Mr Brenden Scott

Mr Jack Reeves

and the following 11 objectors represented by Mr Phil Cockman, Canford Hospitality Consultants Pty Ltd:

- Blistered Bobtail Pty Ltd and Blueray Holdings (as licensees of Cellarbrations Liquor Store at Mundaring)
- Ms Rhonda Christinge
- Mundaring Chamber of Commerce

- Ms Claire Elizabeth Tomlinson
- The Reverend Wendy Gilbert
- Dr Jeremy Harrison
- Ms Janet Lorraine Milburn
- Mundaring Lottery Centre and News
- Ms Lisa Powell
- Mr Andrew Brock
- Mr Geoff Francis

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

Premises: Woolworths Liquor Mundaring, Shops 1 and 3, 7025
Great Eastern Highway, Mundaring

Matter: Application for a grant of a conditional liquor store
licence referred to the Liquor Commission pursuant
to section 24 of the *Liquor Control Act 1988*.

Date of hearing: 20 March 2013

Date of Determination: 2 July 2013

Determination: The application is granted.

Authorities referred to in the Determination:

- *Liquorland (Australia) Pty Ltd v Executive Director of Public Health and Others (LC 18/2012)*
- *Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51*
- *Executive Director of Health v Lily Creek International Pty Ltd & 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) 7 WAR 241*
- *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142*
- *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384*
- *Repertoire Wines Pty Ltd v Director of Liquor Licensing (LC 40/2011)*

Background

- 1 On 6 June 2012, an application was lodged by Woolworths Ltd (“the applicant”) for the conditional grant of a liquor store licence for premises to trade as Woolworths Liquor Mundaring, situated at Shops 1 and 3 in the Mundaring Mall, 7025 Great Eastern Highway, Mundaring (“the premises”).
- 2 At approximately the same time an application by Liquorland Australia Pty Ltd was lodged to establish a liquor store at shops 20 and 21 Mundaring Shopping Village Centre.
- 3 On 29 June 2012, a notice of intervention was lodged by the Commissioner of Police (“the Police”).
- 4 Between 19 July 2012 and 15 August 2012, 19 notices of objection to the application were received from various entities and individuals (together “the objectors”) as follows:
 - Greystone Holdings Pty Ltd
 - Robert and Janet Atkins
 - Jacqueline Denise Joyce
 - Jennifer Anne Trevenen
 - Luke Terrence Reilly
 - Dr Eva Marjanovic
 - Brendon Scott
 - Jack Reeves

Objections lodged by Canford Hospitality Consultants Pty Ltd on behalf of:

- Blistered Bobtail Pty Ltd and Blueray Holdings Pty Ltd
- Rhonda Christinge
- Mundaring Chamber of Commerce
- Claire Elizabeth Tomlinson
- The Reverend Wendy Gilbert
- Dr Jeremy Harrison
- Janet Lorraine Milburn
- Mundaring Lottery Centre and News
- Lisa Powell
- Andrew Brock

- Geoff E Francis
- 5 On 7 September 2013, pursuant to section 24 of the *Liquor Control Act 1988* (“the Act”) the Director of Liquor Licensing (“the Director”) referred the application to the Liquor Commission (“the Commission”).
 - 6 As a preliminary matter, the Commission determined that given that this application was lodged first, it would be heard prior to the application made by Liquorland (Australia) Pty Ltd for a liquor store licence at the Mundaring Village Centre, but that the determinations in both applications would be handed down together.
 - 7 A hearing before the Commission took place on 20 March 2013.

Submissions on behalf of the applicant

- 8 The applicant seeks to operate a liquor store, 115m² in size at the premises. The application is for a conditional licence as the premises are in an existing building which would be required to be refurbished to suit the applicant’s purpose.
- 9 The applicant has complied with all formalities in connection with the application including but not limited to the payment of fees, advertising requirements, section 40 certificate, evidence of tenure and other relevant matters.
- 10 The Public Interest Assessment (“PIA”) and other documentation submitted in relation to the application included:
 - a) plans and photographs of the premises, details of their size and their situation in relation to the shopping precinct of which the premises form a part and a map of the Mundaring CBD;
 - b) details of the applicant’s contribution to community programs;
 - c) harm minimization policy, management plan, house management policy and code of conduct and the applicant’s buying charter;
 - d) Caporn Services Public Interest Assessment Health and Environment Report;
 - e) MGA Town Planners Report and Supplementary Report;
 - f) statements of Anthony Smith, the applicant’s Business Manger Licensing and Shane Tremble, the applicant’s National Liquor Licensing and Acquisitions Manager;
 - g) the applicant’s community investment strategy;
 - h) Mundaring market research including a register for proposed Woolworths Liquor Mundaring containing 292 signatures in support of the proposed premises and a survey questionnaires report with redacted questionnaires completed by 36 respondents, 19 of whom live within the locality; 16 of whom visit the locality and 1 who passes through the area;
 - i) Market research documents being the applicant’s WLG Extract (redacted) and the applicant’s Customer Profiles Extract (redacted) were lodged.
- 11 Witness statements were lodged from:

- Graham McKay
 - Bruce McCullough
 - Domenic Italiano (2)
 - John Cameron
 - Frank Lawrence
 - Mary McBeath
 - Carolyn Grzesczyk
 - Sunil Sharma
- 12 The applicant submitted an analysis of statistics relating to the premises – being a report compiling the crime and health data relevant to the locality and miscellaneous data regarding the number of packaged liquor outlets and supermarkets in the locality.
- 13 A witness statement of Patrick Jeffree (of the applicant’s solicitors) was submitted with, amongst other documents, a review of existing packaged liquor stores in the locality (Cellarbrations Mundaring, Bottle-O Stoneville and the proposed Liquorland liquor store), the applicant’s “secret shopper report” which gives details of the prices, aesthetics, access to and interior of, range of products, layout, staff attire, customer service and staff knowledge in the Cellarbrations and Bottle-O stores respectively. The applicant made thorough, detailed submissions (including submissions in response to the purported objection notices) and oral submissions which are summarized as follows:
- a) the applicant seeks to open a liquor store in an existing building in the Mundaring Mall Shopping Precinct (“the Centre”) – the liquor store will be located diagonally opposite the existing Woolworths supermarket and will be open for trading only when the Woolworths Supermarket is open for trading;
 - b) the proposed premises will comprise approximately 115m² of retail floor space and will stock the standard Woodworths Liquor range of approximately 1700 product lines;
 - c) whilst the Centre fronts onto Great Eastern Highway, the main entrance to the centre and the car park are located at the rear, the parking is adequate, has access to the premises, is lit at night and is suitably landscaped;
 - d) the premises will be well managed, have appropriate security measures in place and measures to minimize any harm or ill-health consequences and will cater for the requirements of consumers.
- 14 The premises will represent a significant step in the development of the retail packaged liquor services and facilities in the locality as it will introduce a new style of facilities that are currently not available in the locality.

Submissions on behalf of the objectors

- 15 In relation to the objection by Blueray Holdings Pty Ltd and Blistered Bobtail Pty Ltd (licensees of Cellarbrations Mundaring Liquor Store) the grounds for objection are that:

- a) granting the application is not in the public interest as the locality is already well serviced by a large and well managed liquor store (Cellarbrations);
 - b) The current liquor store (Cellarbrations) is ideally placed in between the existing Coles and Woolworths supermarkets to service both sets of customers as well as customers of the Hills Fresh store;
 - c) granting the application would cause undue harm or ill-health to people due to the use of liquor;
 - d) a further liquor store so close to the existing one (Cellarbrations) would put downward pressure on liquor prices which would encourage irresponsible consumption of liquor, particularly by young adults attracted to the locality by the numerous fast food outlets nearby (the objector listed those outlets) and young adults will be drawn to the proposed liquor store for cheaper priced liquor products;
 - e) if the application were granted, undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to and from an existing or proposed place of public worship, hospital or school would be likely to occur;
 - f) the proposed liquor store is in close proximity to the Hills Childcare Centre, existing residential properties and a church;
 - g) should the application be granted, the amenity, quiet or good order of the locality in which the premises or proposed premises are situated would be lessened and there will be a lessening of the amenity in the locality through a reduction in retail services.
- 16 In relation to the other objectors including those represented by Mr Phil Cockman of Canford Hospitality Consultants as listed in paragraph 4 of the determination, the grounds of objection were essentially the same as those stated by Blueray Holdings Pty Ltd and Blistered Bobtail Pty Ltd with additional particulars as follows:
- a) increase in alcohol abuse for young men driving under the influence of liquor;
 - b) increase in young adults seeking discount priced alcohol;
 - c) sufficient number of existing liquor licences in the area;
 - d) church, child care facilities and residential properties adjacent to proposed liquor store; and
 - e) further alcohol outlets are not in the community interest.
- 17 The grounds of the objection by Greystone Holdings Pty Ltd, which is the licensee of the Stoneville Liquor Store are essentially the same as those of the other objectors. The objector referred to a number of inconsistencies and inaccuracies in the PIA and proffered academic material relating to the sale and consumption of alcohol and its harmful consequences. The objector also referred to the loss of amenity which would occur if the application were granted – the amenity being the “village style” of the locality including the many outlying “villages”, within the catchment surrounding the locality.

- 18 A portion of the evidence submitted was disregarded by the Commission as it was submitted well after the deadline set by the Commission. In any event the evidence was material of which the Commission was already aware.

Responsive submissions by the applicant to the objections

- 19 The applicant's response to the submissions of the objectors can be summarized as follows:
- a) The objection by Greystone Holdings Pty Ltd states grounds of objection which are not statutory grounds of objection and are either irrelevant, insufficiently probative, have no nexus or are unqualified opinion evidence. Furthermore it is made by a competitor licensee and protection of an existing licensee's business is not a public interest consideration.
 - b) The objections by Blistered Bobtail Pty Ltd and Blueray Holdings Pty Ltd as licensees of the Cellarbrations Mundaring Liquor store are made by a competitor licensee and protection of the market share of existing licensed premises is not a relevant consideration under the proper construction of the Act. The objection is motivated by private and anti-competitive interests and has provided nothing to debunk or challenge the findings of the applicant that there are no distinct identifiable issues with liquor related harm in the locality.
 - c) The other objectors represented by Canford Hospitality Consultants Pty Ltd have failed to discharge the evidentiary burden required to establish each ground of objection. The scant evidence that is provided is largely irrelevant, mere conjecture and unqualified.
 - d) The opinion evidence has no probative value or nexus to the application.
 - e) The additional material provided by Andrew Brock, Claire Tomlinson, and Janet Milburn respectively does not support the grounds of objection upon which each of those objectors rely.

Submissions on behalf of the Commissioner of Police

- 20 If the application was granted and/or conditions not imposed, public disorder or disturbance would be likely to result.
- 21 Statistical data utilizing the Police Incident Management System ("IMS") and the Computer Aided Dispatcher System ("CAD") reveal that there is existing harm in the locality. Although police attendances within the immediate vicinity of the proposed premises were relatively low, the overall level of alcohol related harm and offending in the locality is of primary concern to police.
- 22 The potential for harm or ill-health must be taken into account by the licensing authority irrespective of whether the prospect is a possibility or a probability and is a powerful public interest consideration.
- 23 There already exists a liquor store (Mundaring Liquor Store – Cellarbrations) at 7145 Great Eastern Highway within approximately 150 meters of the proposed premises.
- 24 The "Pereira Report" (*Access to Alcohol Outlets, Alcohol Consumption and Mental Health*) points to a positive association between exposure to alcohol outlets and harmful alcohol consumption and the reference to "any other matter relevant to the

public interest” in section 69(6)(c)(iv) of the Act clearly includes the matters the subject of the Pereira Report, particularly given the notorious fact of the relationship between alcohol consumption and violent or disorderly behavior.

- 25 It is misleading to suggest that because the Executive Director of Public Health has not intervened in or objected to the application, “health issues” need not be considered by the Commission when determining the application. The Police are entitled to bring the issues which are the subject of the Pereira Report to the attention of the Commission as “matters relevant to the public interest”.
- 26 The Police do not support the application due to sufficient liquor store outlets and existing harm in the locality, however, if the Commission is of the opinion that the granting of the licence is in the public interest it is requested that a number of conditions be imposed.

Responsive submissions by the applicant to the intervention

- 27 The applicant responded to the intervention by the Commissioner of Police noting that:
 - a) The Police have not objected to the application.
 - b) All an intervener is entitled to do is to bring to the attention of the licensing authority issues it considers are relevant in the application to assist the decision maker.
 - c) The Police have failed to establish that the grant of the application will result in the occurrence of “public disorder or disturbance” or that the grant of the application is not in the public interest.
 - d) Many of the representations and comments by the Police are either outside of section 69(6)(c)(ii) or (iv) of the Act or have no probative value and cannot be considered by the Commission, for instance, representations on harm and ill-health matters. Comment is made on outlet density which is not a relevant consideration and reference to and reliance upon general research in academic papers in particular the Pereira Report (which the Commission determined could be brought in as evidence) to demonstrate potential alcohol related harm which without specific reference to a specific group within a specific locality has no significance.
 - e) The Police are erroneous in their belief that a general risk of harm by liquor consumption is relevant to the application.

Determination

- 28 An applicant for the grant of a liquor store licence must, pursuant to section 38(2) of the Act, satisfy the licensing authority that the grant of the application is in the public interest.
- 29 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 Minster for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WASCA 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 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”.

30 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.

31 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 minimizing alcohol related harm and endeavoring 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).

32 Lastly, pursuant to section 33(1) of the Act the licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest. In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 EM Heenan J described the “absolute discretion” provided for under section 33 (1) in the following terms:

The “absolute discretion” to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356 [6] – [7] (Wallwork J) and Palace Securities v Liquor Licensing (1992) 7 WAR 241, 249-250 (Malcolm J) and 263 (Wallwork J). Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael: Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231; (2002) 25 WAR 511, [52] – [55]; O’Sullivan v Farrer [1989] HCA

61; (1989) 168 CLR 210, 216 and *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380, 400.

- 33 Geographically, the Mundaring Shopping Centre consists of two retail areas – what is known as Mundaring Mall which contains a Woolworths Supermarket and Cellarbrations Liquor store and the Mundaring Village Centre the anchor tenant of which is a Coles Supermarket. For the purposes of this application the Commission views this as one shopping complex or precinct and it was clear from the evidence of both applicants and objectors that they viewed it so.
- 34 The proposed Woolworths liquor store is approximately 115m² of retail floor space, which is relatively small by Western Australian standards.
- 35 The resident population of Mundaring is approximately 38,107 people, however, the evidence submitted by the applicant and supported by the evidence of many of the objectors demonstrates that the shopping precinct draws significant custom from surrounding areas which are not serviced by their own supermarkets and ancillary specialty shops.
- 36 The applicant's PIA included a Health and Environment Report by Caporn Services and reports by MGA Town Planners. In addition statements from senior employees of the applicant outlining the Woolworths business model, reputation and method of conduct of its premises were supplied.
- 37 The Police intervened on the basis that if the particular application was granted and / or conditions not imposed, issues of public disorder or disturbance would be likely to arise. The notice of intervention by the Police included data on existing alcohol related harm in the locality.
- 38 The Commission must consider the likelihood of harm or ill-health being caused by the grant of the application. One of the Act's primary objectives is the minimization of harm and ill-health. Section 38(4) also makes clear the obligation of the applicant adequately to address this issue.
- 39 Given the submissions provided in the Caporn Report and MGA Town Planners evidencing a relatively advantaged demographic with no significant over representation of any "at risk" groups along with the Police IMS and CAD statistical data which reveal that police attendances within the immediate vicinity of the proposed premises are relatively low, the Commission is unable to reach a conclusion that public disorder or disturbance would result from the grant of the application.
- 40 The objectors and the Police further raised the issue of outlet density arising out of this application and the parallel application by Coles for a Liquorland store in the same shopping precinct.
- 41 Whilst the Commission is mindful of the possible vested commercial interest of the licensee objectors these objections must be dealt on their own merits.
- 42 Outlet density is not a matter of itself that is prescribed by the Act as requiring direct consideration by the Licensing Authority but is relevant within the context of the objects of the Act. Section 5(1) of the Act states:

the primary objects of the Act are –

- a) *To regulate the sale, supply and consumption of liquor; and*

- b) *To minimize harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
 - c) *To cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*
- 43 The Commission is well aware of its own knowledge of a body of academic research in reference to outlet density e.g. *Predicting Alcohol Related harms from licensed outlet density: A feasibility study* (Chikritzhs, Catalano, Pascal and Henrickson, 2007) and the *Pereira Report* and has previously expressed the view that some caution has to be shown in how the conclusions of this body of research are viewed.
- 44 In *Liquorland (Australia) Pty Ltd v Executive Director Public Health and Others (LC18/2012)*, the Commission stated:
- “There is a considerable body of research which demonstrates a correlation between outlet density and harm caused but this needs to be applied with caution to specific locations as much of the data is aggregated and general in nature.”*
- 45 Although a direct causal relationship has not been demonstrated to an accepted epidemiological standard, the Commission accepts the position that there is a well demonstrated correlation between outlet density and harm and ill-health which is a relevant issue in establishing public interest.
- 46 It is apparent from the material before the Commission that there is currently a high level of “leakage” from the Mundaring area to Midland and other centres for liquor purchases, indicating that the requirements of consumers in Mundaring for liquor and related services is not currently being adequately catered for.
- 47 In *Woolworths Limited v Director of Liquor Licensing [2012] WASC 384* EM Heenan observed at Para 39:
- “Inevitably, because of the breadth of its discretionary considerations, already described, there are likely to be differences, even broad differences, of view about whether or not a particular application is within the public interest or even whether it is consistent with the proper development of the liquor industry. Those are determinations which are entrusted to the Commission which is especially appointed, selected and empowered to make them.”*
- 48 It is therefore a matter for the Commission to determine whether the granting of the licence, and possibly a second new licence from the Liquorland store application, could be constituted as a proliferation of licenses and lead to the conclusion that the grant of this application was not in the public interest.
- 49 The Commission is also cognisant of the view expressed by the then responsible Minister in the second reading Speech for *the Liquor and Gaming Legislation Amendment Bill 2006*, which introduced the public interest in place of the previous needs test is also relevant and states:
- “..... 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”.*
- 50 There is sufficient evidence put before the Commission by the applicant that establishment of such a moderately sized liquor outlet in proximity to Woolworths

Supermarket will provide in addition to a one-stop shopping convenience for consumers, a greater shopping choice.

- 51 In the Commission's view none of the objectors made out their objections as required by section 73(10) of the Act, however, this is not fatal to the extent that the Commission can take note of the objectors' view. Edelman J in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51* held at para 30 that

"...Each single objector might, individually, fail to satisfy an onus of establishing an objection, but the cumulative effect of the evidence might lead to the conclusion that an applicant has failed to satisfy its ultimate onus of showing that the application was in the public interest".

- 52 Granting this licence would increase the current packaged liquor floor space in Mundaring shopping precinct and therefore the outlet density but this does not in itself mean that the granting of the application would be contrary to the objects of the Act and / or not in the public interest. In assessing the application, the Commission has determined that granting the licence would be consistent with the objects of the Act and given the good management credentials of the licensee, acknowledged by the Commission in previous matters coupled with particular local, social, demographic and geographic circumstances of this application, on the balance of probabilities there is little likelihood that the granting of the licence will result in increased public disorder, disturbance or negative impacts on the amenity of the area.

- 53 Ultimately, the Commission gives more weight to the cumulative beneficial effects in granting this licence when compared to any negative impact that the grant of licence may have.

- 54 The Commission is therefore satisfied, based on the evidence, that the applicant has discharged its onus under section 38(2) of the Act and the grant of this application is in the public interest. In reaching this determination the Commission has considered the request by the Police to impose certain conditions on the licence, however, accepts the position put by the applicant that some of the suggested conditions do not have a special relevance to this application and will be covered by the Director's policies. Therefore the normal conditions that apply to a liquor store licence will apply.

- 55 The Commission emphasizes that while each of the applications by Woolworths Ltd and Liquorland (Australia) Pty Ltd has been assessed and determined on their own merits the evidence in both applications has been considered holistically to determine what is in the public interest in relation to the township of Mundaring.

- 56 Accordingly, the application for the conditional grant of a liquor store licence is granted.



MR JIM FREEMANTLE
CHAIRPERSON