

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Australian Leisure and Hospitality Group Pty Ltd
(represented by Mr Gavin Crocket of GD Crocket & Co)

Intervener: Director of Liquor Licensing
(represented by Mr Nick John of State Solicitor's Office)

Observer: Mr Colin Gourdis, representing the licensee

Commission: Mr Eddie Watling (Deputy Chairperson)
Mr Greg Joyce (Member)
Mr Seamus Rafferty (Member)

Matter: Application for a review of a decision of the Director of Liquor Licensing pursuant to section 25 of the *Liquor Control Act 1988*

Date of Hearing: 12 October 2011

Date of Determination: 21 October 2011

Determination: The decision of the Director of Liquor Licensing is affirmed and the application is refused.

Authorities Referred to by the parties and considered in Determination

- *Executive Director, Public Health & Anor v Woolworths Ltd & Ors* [2002] WASCA 108
- *Hancock v Executive Director of Public Health* [2008] WASC 224

- 1 This is an application for review of the decision of the Director of Liquor Licensing (“DLL”) refusing an application for the redefinition of the licensed premises known as the Leisure Inn Rockingham (“the licensed premises”) - the corporate licensee being Australian Leisure & Hospitality Group Pty Ltd (“the Applicant”). The application is made pursuant to section 25(1) of the *Liquor Control Act 1988* (“the Act”).

- 2 At the hearing of the application and in written submissions forwarded to the Liquor Commission of Western Australia (“the Commission”), counsel for the Applicant addressed alleged errors made by the delegate of the DLL in determining the original application for a redefinition of the licensed premises. For the purposes of an application pursuant to section 25(1) of the Act, an applicant does not need to establish error at first instance to enliven the discretion of the Commission. The application must be considered on its merits based on the materials that were before the DLL at first instance. **(*Hancock v Executive Director of Public Health* [2008] WASC 224, Martin CJ at [53]-[54])**

BACKGROUND

- 3 By way of an application dated 10 June 2011, the Applicant filed a *Notice of Application for Approval of Alteration/Redefinition of Licensed Premises* with the DLL. The details of the application were described as a ‘*[r]edefinition of the licensed premises to include a Dan Murphy’s Liquor outlet at the premises to be situated on the corner of Chalgrove Avenue and Read Street. The variation to the licensed premises is depicted on the plan attached and marked “A”.*’ The plan shows the proposed redefinition involves the construction of a building separate to the existing buildings that constitute the existing licensed premises. A Public Interest Assessment Statement (“PIA”) was forwarded to the DLL on 20 June 2011.

- 4 In correspondence dated 24 June 2011, a Senior Premises Inspector of the DLL, Mr Daryl McLachlan advised the Applicant that the application for the redefinition of the licensed premises could not be approved under section 77

of the Act and that it would be more appropriate for the proposed new packaged liquor outlet to operate under its own licence. The basis for this assessment was that, *'...the application fails the requirements of section 77(5a) of the Liquor Control Act 1988. Whilst the proposed packaged liquor outlet is on the same lot as the hotel it is not contiguous to the existing licensed premises.'*

STATUTORY FRAMEWORK

5 Section 77(4) of the Act states that:

'On application in writing being made by the owner or occupier of the licensed premises, or by the licensee with the consent of the owner or any lessor, the licensing authority may approve –

(a) a proposed alteration of licensed premises; or

(b) unless section 80 applies, the redefinition of the licensed premises as defined in the license.'

6 Section 77(5a) of the Act states that:

'An application for the alteration or redefinition of licensed premises as defined in a license that seeks to include in those licensed premises an area that is not contiguous with those licensed premises shall not be approved by the licensing authority...'

7 There are three exceptions to the requirement for contiguity required by section 77(5a) of the Act, none of which have application to this matter.

DOES THE APPLICATION INVOLVE A REDEFINITION OF LICENSED PREMISES?

8 The first question that must be determined is whether the application the subject of the review hearing constitutes a "redefinition" of licensed premises.

The Commission has focussed on the term “redefinition” on the basis that the Applicant maintained at the hearing that this was an application for a redefinition of premises and was not an alteration to existing licensed premises.

- 9 The term “licensed premises” is defined in section 3 of the Act as meaning, *‘the premises specified or defined by the licensing authority in relation to a license, protection order or permit as the building or place to which that license, order or permit relates.’* The term “redefinition” is not defined in the Act.
- 10 What constitutes a redefinition of licensed premises was considered in ***Executive Director, Public Health & Anor v Woolworths Ltd & Ors [2002] WASCA 108***. In that case, the Full Court was required to determine whether the building of a drive through purchase facility approximately 100 yards from the existing licensed premises constituted a redefinition or alteration of the existing licensed premises. In upholding the appeal, Wallwork J (with whom Steytler and Wheeler JJ agreed), determined that, *‘[T]he proposed new bottle shop as a matter of commonsense and ordinary language, is clearly a separate premises from the bottle shop within the shopping centre. The proposal is not a redefinition of any existing premises. It is the creation of a new bottle shop some distance away, without any alteration or redefinition of the existing premises.’* [15]
- 11 Having regard to the materials put before the Commission, specifically the plan marked as Schedule 1(A) which was annexed to the Applicant’s written submissions dated 7 October 2011 and applying the rationale for the decision in ***Executive Director, Public Health & Anor v Woolworths Ltd & Ors*** the Commission does not consider that the proposed redefinition actually constitutes a redefinition of the licensed premises as defined in the existing licence. The application in this instance involves the construction of a new building that at its closest point is 20.75 meters from the existing licensed premises. The building at that closest point is the existing motel units. The application does not involve any change to the buildings constituting the

existing licensed premises and as such, as a matter of commonsense the construction of a new building separate to the existing buildings cannot be a redefinition of the licensed premises.

12 It should be noted that the application in ***Executive Director, Public Health & Anor v Woolworths Ltd & Ors*** was made pursuant to section 77 of the *Liquor Licensing Act 1988*. Section 77(4) of that Act had the same requirements as for an application pursuant to section 77(4) of the current Act. Accordingly, the interpretation of “redefinition” that was adopted by the Full Court in that instance is applicable to this application. The amendments made to the Act by the *Liquor and Gaming Legislation Amendment Bill 2006* did not alter section 77 in any material way that would lead to a conclusion that a different interpretation of redefinition should be applied in this instance.

ISSUE OF CONTIGUITY

13 Even if the Commission was to determine that the application involved a redefinition of the existing licensed premises, it would then need to consider whether the redefinition sought to include in the existing licensed premises an area that was not contiguous with those licensed premises.

14 It was conceded at the hearing by counsel for the Applicant that the proposed new building was not physically contiguous with the existing licensed premises. However, it was submitted that the proposed Dan Murphy’s store would be joined in a business sense. The Commission understood that to mean that the store would be owned by the same company that owns the Leisure Inn Rockingham.

15 The term “contiguous” is not defined in the Act. The term is defined in the *Concise Oxford Dictionary* as meaning ‘sharing a common border’ or ‘next or together in sequence’. By its very definition, the term imports a physical aspect.

16 In determining the meaning of ‘contiguous’ for the purpose of interpreting section 77(5a) of the Act, the *Interpretation Act 1984* allows for the

consideration of material not forming part of the written law *'to confirm that the meaning of the provision is the ordinary meaning contained by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law.'* In this regard, section 19(2)(f) of the *Interpretation Act 1984* allows for consideration of *'the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House.'*

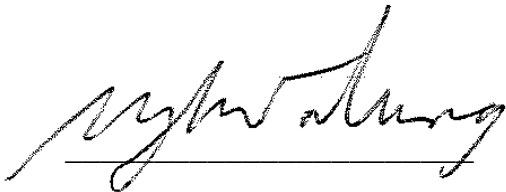
17 Section 77(5a) of the Act was inserted by section 6(1) of the *Liquor Licensing Amendment Bill 2001*. In his second reading speech, the Minister for Racing and Gaming, the Hon ND Griffiths relevantly stated that, *'[T]he Bill also addresses industry concerns regarding precedent decisions by the Liquor Licensing Court supporting the establishment of non-contiguous, or what have been described as satellite, liquor outlets utilising the provisions of the Act dealing with the alteration or redefinition of licensed premises.'* (Hansard, Legislative Council, Thursday 9 August 2001, p.2299)

18 The Minister further stated that, *'[T]he amendments relating to non-contiguous liquor outlets will clarify the intent of the licensing process, by precluding the approval of an application to alter or redefine the licensed premises when the application seeks to include in the licensed premises an area that is not contiguous with the existing licensed premises.'* (Hansard, Legislative Council, Thursday 9 August 2001, p.2299)

19 The proposed Dan Murphy's store could not be considered contiguous with the existing licensed premises in any way having regard to the ordinary meaning of the word. As stated, the nearest point to the existing licensed premises is 20.85 meters. Further, in considering the Minister's second reading speech and the intent of the legislature, it was the granting of licences such as that applied for in this instance that led to the enactment of section 77(5a) of the Act, so as to stop satellite outlets from being attached to existing licences. In the Commission's opinion, the proposed Dan Murphy's would constitute a satellite outlet by virtue of the distance between the proposed new building in which it would operate and the existing buildings.

20 The submission that the Leisure Inn Rockingham and Dan Murphy's would be linked in a business sense is irrelevant to a determination of this application as the focus of section 77(5a) of the Act is on the physical aspect. In that respect, the buildings do not have a common border or are not next to each other. To the contrary, they are separated by a car park and a roadway for the use of patrons within the hotel complex.

21 For the reasons outlined, pursuant to section 25(4)(a) of the Act, the decision of the DLL at first instance is affirmed and the application is refused.

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

Eddie Watling
Deputy Chairman