

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: OLD GRENACHE PTY LTD

PREMISES: AUBERGINES PROVIDORE & WINE MERCHANT

PREMISES ADDRESS: 288 LORD STREET, HIGHGATE

APPLICATION ID: A000180168

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 09 OCTOBER 2015

Introduction

- 1 This is an application by Old Grenache Pty Ltd (the applicant) for the conditional grant of a liquor store licence in respect of premises to be known as Aubergines Providore & Wine Merchant and located at 288 Lord Street, Highgate. The application is made pursuant to s 47 and s 62 of the *Liquor Control Act 1988* (the Act).
- 2 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. Objections to the grant of the application were lodged by the following:
 - Mrs Barbara Harris (on behalf of the Emmanuel Self-Help Centre for People with Disabilities)
 - Rachel and Menno van Rookhuijzen
 - John and Dian Nelson
 - Carolyn O'Driscoll
 - Mr L A and Mrs P Fretz
 - Teresa Radosevic
 - Mr P Mahoney
 - The WA Indo-China Chinese Benevolent Association
 - Amanda Di Virgiho
 - Rose Farrell and Rodney Powell
 - Lesley Bowerman
 - Charlie Speranza and Ivana Speranza

- Rev Monsignor Michael Keating
- 3 A petition was also lodged opposing the grant of the application. There were no interventions to the application.
- 4 Some objections were lodged out of time; however pursuant to s 73(5) of the Act, I am satisfied that it is in the public interest that these objections be heard and I do not believe the applicant is unfairly prejudiced in this regard. In carrying out its functions under the Act, the licensing authority should adopt a flexible system with as little formality or technicality as may be practicable (refer object 5(2)(e) of the Act). Also, s 16(1) of the Act provides that the licensing authority may receive submissions and representations in relation to any application before it, as it thinks fit. Similarly, Ms Harris lodged some material four days outside the timeframes for the parties to submit their evidence, however, given Ms Harris is self-represented, I believe some leeway should be afforded Ms Harris and this material will be accepted into evidence. Once again, the applicant was not unfairly prejudiced, and it was afforded additional time in which to respond to this material.
- 5 Pursuant to s 13 and 16 of the Act, the application will be determined on the written materials lodged. The submissions and evidence on the parties are briefly summarised as follows.

Submissions on behalf of the applicant

- 6 The applicant intends to operate a delicatessen and offer low volume sales of wine, boutique beer and some spirits. As well as the liquor to be sold at the premises, the applicant will offer fresh market produce, freshly baked goods such as quiches, muffins, cakes and pies, freshly squeezed juices, coffee and small goods. The premises will also provide pre-cooked meals such as roast meats and vegetables, salad, soups, ratatouille, curries and continental rolls and will also stock a small range of general pantry items and vegetables for convenience purchases by customers wishing to cook at home. In total, the proposed premises will be approximately 130m², of which 45m² will be devoted to the sale of liquor.
- 7 According to the applicant, it intends providing small boutique producers an outlet in Perth, including Western Australian, South Australia, Victorian and Tasmanian wine producers, hand crafted beer manufacturers from Australia, New Zealand, USA and UK as well as organic and biodynamic wine producers and gluten free beer manufacturers.
- 8 While it is intended that the delicatessen will operate extended hours, liquor sales will be limited to 8 a.m. to 10 p.m. Monday to Saturday and 10 a.m. to 10 p.m. Sundays. During the period when liquor will not be sold, the liquor sales area will be locked behind retractable gates of approximately 2 metres in height and be inaccessible to patrons. The applicant envisages that the bulk of its customer base will be local

residents and workers who seek a convenient local supplier of fresh and premade foods.

- 9 The applicant submitted a Public Interest Assessment (PIA) which provided data on the socio-economic status of the locality surrounding the premises and existing alcohol-related harm and crime trends. The applicant also submitted various testimonials and nine letters of support. A further two letters of support from local residents were received.
- 10 To further support the application, the applicant submitted a Town Planning Report prepared by Burgess Design Group. This report provided information on the possible impact on the local amenity, future growth and development in the locality; and the location of existing liquor stores within the locality. According to the Town planning Report, significant population growth is anticipated in the locality, in particular within the Claisebrook Road North Precinct, over the next 5 to 15 years and the location of the proposed premises is considered appropriate as it is within a mixed use development that has been approved by the City of Vincent. The proposed premises will be well integrated with the surrounding area in terms of access and parking and will contribute positively to the activation of the pedestrian environment. The Town Planning Report concluded that the proposed liquor store will not result in any undue impacts on the amenity or character of the surrounding area and aligns with the proposed strategic vision for the locality.
- 11 Consequently, it was submitted by the applicant that the grant of the application will have a positive impact on the community by providing a convenient shopping experience for local residents and workers and provide a facility which does not currently exist in the area. The proposed manner of trade, namely offering low-volume sales of packaged liquor, is unlikely to create anti-social activities within the locality.

Submissions on behalf of the objectors

- 12 Most of the objectors raised similar concerns, namely there are already sufficient liquor outlets in the locality and the grant of the application will have a negative social impact because of increased violence and anti-social behaviour.
- 13 Concerns were also raised by some objectors about the proximity of the proposed liquor store to the Emmanuel Centre and the presence of at-risk groups in the immediate vicinity of the proposed store. St Francis Xavier Church is also nearby and according to Rev Monsignor Keating, the area around the Church is often the scene of drunken behaviour and making it easier for people to access alcohol will do nothing to ameliorate the situation.
- 14 Ms Barbara Harris is the co-ordinator of the Emmanuel Centre which is a self-help centre for people with disabilities, which includes children with special needs and people with physical and mental health issues, and their families. The Centre has operated out of its current site in Windsor Street for over 30 years and some of its

clients have alcohol-related problems. Also, people with disabilities reside next to the Centre. It was submitted by Ms Harris that clients of the Emmanuel Centre are unable to cope with drunken behaviour and other undesirable behaviours including sexual harassment, litter and the like.

Determination

- 15 Section 38(2) of the Act places an onus on the applicant for the grant of a liquor store licence to satisfy the licensing authority that the grant of the application is in the public interest.
- 16 In determining whether the grant of an application is 'in the public interest' I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
- 17 The factual matters which the licensing authority is bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5.
- 18 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.
- 19 The secondary objects of the Act are:
 - to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
 - to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
- 20 The licensing authority is also entitled (but not bound) to take into account the factual matters set out in s 38(4) of the Act as part of the public interest considerations.

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- 21 The proposed liquor store is to be located on the ground level of the 288 Lord Apartments, which comprises 26 single bedroom dwellings; 42 two and three bedroom dwellings; 1 shop; 4 offices and associated car parking. The proposed premises itself will comprise an area of 130m², which will include 55m² trading floor area for gourmet food sales and 42m² for liquor sales. The liquor component will be physically separated from the other grocery items by a mid height product display unit with only one point of entry being a 1.2 metre wide opening adjacent to the sales counter and point of sale. This opening will be fitted with a 2 metre high retractable gate to close off the area.
- 22 The Town Planning Report stated that the nature and character of the area is expected to significantly change over the next 5-15 years. This change in character has already commenced with the significant mixed-use commercial/residential projects having recently being completed or a currently under construction.
- 23 According to the applicant, the main business focus will be the gourmet deli, with the sale of liquor being an ancillary component. It was submitted that the grant of the licence will provide a convenience for residents and workers in the area. The increase in the number of high density residential dwellings in the area means a large number of potential customers in the immediate proximity and it is these people the applicant intends to service. The applicant submitted nine letters of support, three from local residents and six from small business operators in the area. Two more letters of support were received from the public.
- 24 Catering to the requirements of consumers for liquor and related services is one of the objects of the Act; however this needs to be considered in the context of the proper development of the liquor industry.
- 25 In this regard, Heenan J In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, said:

“Whether any particular licence application will or will not contribute to the proper development of the liquor industry or whether it will facilitate the use and development of premises in a manner which reflects the diversity of the requirements of consumers in this State are questions of fact, degree and value judgement..... I have previously concluded that the primary objects of the act set out in s 5(1)(c) are not the only or the exclusive objects of the Act and, except to the extent of any inconsistency, do not restrict considerations of the public interest required by s 33(1) or s 38(2).

Because the appellant has emphasised the potential significance of the primary objects of the Act set out in s 5(1)(c), it is necessary to observe that another primary object specified by s 5(1)(a) is to regulate the sale, supply and consumption of liquor and that this statutory policy of regulation is entirely consistent with the measured approach to what may

be regarded as contributing to the proper development of the liquor industry and to the facilitation of the use and development of licensed premises to reflect the diversity of requirements in this State. These considerations are inextricably linked with the public interest and cannot be properly addressed or applied without regard to it."

26 Also, catering to the requirements of consumers must be considered against the other objects of the Act, one of which is to minimise harm caused to people, or any group of people, due to the use of liquor. Whilst the SEIFA index indicates the locality is not disadvantaged, the evidence indicates that:

- within a 2 kilometre radius of the proposed liquor store there are 12 existing liquor stores, 48 taverns and 14 hotels all capable of selling packaged liquor;
- the nearest existing liquor store to the applicant's proposed premises is 400 metres away with another store within one kilometre;
- the number of offences in the Town of Vincent decreased by 17.3% between 2008-09 and 2009-10 however the number of offences against the person increased slightly in this period;
- in 2009-10, 56.6% of assaults in the Town of Vincent were alcohol-related which is higher than the State rate (45.2%); and
- for the period 2007-2011, the total rate of alcohol-related hospitalisations in the Town of Vincent was 1.5 times the corresponding State rate.

27 The evidence also indicates that there are at-risk persons nearby the proposed liquor store with:

- the Emmanuel Centre, which provides services for children with special needs and people with physical and mental health issues, including alcohol-related problems, is just down the street;
- people with disabilities residing adjacent to the Emmanuel Centre; and
- the Salvation Army's "Bridge House", a drug and alcohol rehabilitation centre offering residence and non-residence rehabilitation programmes is 200 metres away (although according to the applicant Bridge House is separated from the premises by an established residential neighbourhood and is located a similar distance from the Brisbane Hotel which allows the on-site consumption of liquor).

28 There is no presumption in favour of the grant of an application. Rather the opposite applies where the Act imposes a positive obligation on an applicant to satisfy the licensing authority that the grant of the application is in the public interest. Each application must be considered on its merits after such inquiry as the licensing authority thinks fit (refer s 33) and the burden of persuasion imposed on an applicant must be satisfied by evidence submitted in any particular case (refer *Woolworths Ltd v*

Director of Liquor Licensing [2012] WASC 384). The commercial interests of an applicant do not necessarily coincide with the public interest.

- 29 The applicant is essentially relying upon eleven letters of support to demonstrate that the grant of the application will be catering for the requirements of consumers for liquor and related services.
- 30 In *Buswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010), the Liquor Commission stated that it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of their application. Such opinions and assertions must be supported by an appropriate level of evidence. Consequently, the Liquor Commission has observed on numerous occasions that a licence should not be granted simply because the applicant has a good idea to set up a liquor outlet.
- 31 More to the point, in LC 51/2011, the Liquor Commission stated the an applicant must present supporting evidence at the appropriate level to satisfy the Commission that there is a real and demonstrable consumer requirement to justify the granting of the licence and the type of information that would be probative to the Commission includes market surveys, petitions of substance and information that demonstrates a real consumer requirement.
- 32 In my view, the eleven letters of support, where many supporters refer to the convenience of being able to walk to the proposed liquor store to obtain liquor, falls well short of the level of evidence required to satisfy me that the grant of the application will be catering to the requirements of consumers for liquor and related services and that the grant of this application will contribute to the proper development of the liquor industry.
- 33 The type of licence sought also has some bearing on the level of evidence required. In this case, the applicant is seeking a liquor store licence.
- 34 No doubt some members of the community will always find it convenient to be able to walk to a packaged liquor outlet, however, the proliferation of liquor outlets is not in the public interest. In the Second Reading Speech which accompanied the introduction of the *Liquor and Gaming Legislation Amendment Act 2006* (see *Parliamentary Debates, WA Parliament, vol 409, p 6342*) the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, stated:

“A key reform is the creation of the public interest test.... Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts of the community.... it should be noted, however, that the government does not consider the proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test.”

- 35 The quality of the applicant's evidence must be weighed against other factors including:
- the existence of numerous packaged liquor outlets in locality including an existing liquor store 400 metres away and another liquor store approximately one kilometre away;
 - the close proximity of at-risk persons to the proposed liquor store; and
 - the existing level of alcohol-related harm in the locality (particularly assaults and hospitalisation rates).
- 36 Although the Town Planning Report suggests that the location of the proposed premises is appropriate, in weighing and balancing the competing interests in this case; namely the convenience to some members of the community (as evidenced by eleven letters of support) against the potential for increased alcohol-related harm, I find that the perceived benefits are marginal and do not outweigh the potential risks. Ipp J in *Executive Director Public Health v Lily Creek International & Ors [2000] WASCA 258* stated that the potential for harm to occur is an important public interest consideration.
- 37 In arriving at the above conclusion and the weight I have attributed to the evidence, I have had regard to the recent observation of the Liquor Commission in LC 21/2015, where it said:
- “If convenience was seen to be meeting the “public interest” requirement, then the weight to be accorded to that factor would also need to be reviewed in the context of the proper development of the liquor industry. In that respect, the provision of liquor products in supermarkets, delicatessens, butchers, or other retail outlets where grocery items are purchased regularly, and at which it would merely be convenient to buy liquor, is viewed by the Commission as not being a sufficient reason to grant an application for a liquor store licence.”
- 38 I therefore find that the applicant has failed to discharge its onus under s 38(2) of the Act and the application is refused.
- 39 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
- 40 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING