

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: WOOLWORTHS LIMITED

PREMISES: BWS - BEER WINE SPIRITS FALCON

PREMISES ADDRESS: MIAMI PLAZA SHOPPING CENTRE, 3 OLIVE ROAD
FALCON

APPLICATION ID: A000190986

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 19 JULY 2016

Introduction

- 1 This is an application by Woolworths Limited for the conditional grant of a liquor store licence for premises to be known as BWS – Beer Wine Spirits and located in the Miami Plaza Shopping Centre (the Centre), corner Old Coast Road and Olive Road, Falcon. The application is made pursuant to ss 47 and 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. An objection, pursuant to s 73 of the Act, was lodged by Mr Adam Riley. Pursuant to s 16(1)(b) and s 69 of the Act, I requested a report from the Executive Director Public Health (EDPH) and the Commissioner of Police (the Commissioner) on crime and health data for the locality. A copy of these reports was provided to the applicant.
- 3 The application will be determined on the written material lodged by the parties as permitted under ss 13 and 16 of the Act. The evidence and submissions of the parties are briefly summarised as follows.

The applicant's evidence and submissions

- 4 It was submitted by the applicant that Falcon is a southern suburb of Mandurah, located southwest of Mandurah's central area on the Indian Ocean. Falcon is one of four Mandurah suburbs that lie on an island bound by the Mandurah Estuary to the north, the Peel-Harvey estuary to the east, the Dawesville Channel to the south and the Indian Ocean to the west. It is also bisected by the Old Coast Road, which connects Falcon to nearby Mandurah and Bunbury. Falcon was formerly known as Miami, which is still used in the names of various buildings, including the Centre, which is on the corner of Old Coast Road and Olive Road, Falcon.
- 5 To cater for the growing population in the area, the Centre is undergoing a substantial refurbishment and expansion, which represents a planned response to an identified need for improved access to consumer goods and retail services in Falcon. The

Centre is the major retail focus for residents of the area and the proposed liquor store is to be located adjacent to a refurbished and extended Woolworths supermarket within the Centre. The proposed liquor store will be modern, well-designed, premises offering a broad range of products, services and facilities.

- 6 According to the applicant, the granting of the licence will provide consumers with increased shopping convenience as they will be able to complete their packaged liquor purchases at the same time as completing their other shopping at the Centre (i.e. “one-stop shopping”) resulting in considerable saving in time and effort.
- 7 In conjunction with its Public Interest Assessment (PIA), the applicant also submitted an *Assessment of Community Attitudes* prepared by West Coast Field Services (WCFS). WCFS undertook face to face interviews with 401 people out the front of the Woolworths supermarket in the Centre. Of those persons who thought the grant of the application was a good idea, the convenience of purchasing liquor with their groceries was the predominant reason for that support. Sixty one percent of respondents indicated they are likely to use the proposed liquor store.
- 8 It was submitted by the applicant that the locality surrounding the proposed liquor store is a rapidly growing, affluent population with an increased need for services in general, and packaged liquor in particular. The grant of the application will cater to consumers in terms of choice, diversity and convenience both now and into the foreseeable future.
- 9 In summary, the applicant submitted that the grant of the application was in the public interest because:
 - it will provide for the one-stop shopping convenience of people using the Centre;
 - the levels of alcohol-related crime and ill-health in the location are low;
 - there is no additional risk to any at-risk or vulnerable group;
 - the exercise of the licence is highly unlikely to result in any increase in the rates of crime or ill-health to the public or adversely impact upon the amenity of the locality;
 - the exercise of the licence is highly unlikely to result in any offence, annoyance, disturbance or inconvenience to the public; and
 - the applicant will provide extensive controls and ensure compliance with the responsible service of alcohol and harm minimisation policies and procedures.

The objector’s evidence and submissions

- 10 According to the objector, there are already sufficient liquor outlets in the area, including a First Choice destination liquor store in close proximity to the applicant’s premises. It was submitted that the application should not be approved simply because it is convenient for a few when the majority of people are quite happy with the existing

established stores in the locality. In this regard, it was submitted that little weight should be given to the applicant's evidence relating to consumer support for the application.

- 11 It was also submitted that grant of the application is likely to increase criminal activity because thieves are likely to be attracted to the store.
- 12 Overall, the objector was of the view that there is no justification for the grant of the application and the public in the locality already have easy access to a number of packaged liquor outlets.

The reports from the Executive Director Public Health and the Commissioner of Police

- 13 These reports indicate that for the last three calendar years, rates of alcohol-related domestic assault offences in Falcon were consistently above the State rate and have been trending upwards, whilst similar data for Mandurah, the South Metropolitan District and the State rates have remained steady or declined.
- 14 In 2013, there were 17 alcohol-related domestic assault offences in Falcon, rising to 32 in 2015. The domestic assault offence rate per 1,000 persons in Falcon in 2013 was 3.6, increasing to 6.8 in 2015. These figures are well above Mandurah (2.9 in 2013 and 2.8 in 2015), the South Metropolitan District (2.2 and 2.0) and the State rates (3.0 and 2.8).
- 15 Non-domestic assault offence rates (per 1,000 persons) in Falcon have increased since 2013 (0.9), peaking in 2015 (1.9), which is higher than the State rate.
- 16 The reports further indicated that more than three-quarters of drink driving charges in the locality were recorded as having their last drink at a private residence, public place or vehicle, which corresponds to people who would likely have been drinking packaged liquor. For the period 1 January 2013 to 31 December 2015, there were 172 treatment episodes by relevant agencies involving persons residing in Falcon, of which alcohol was identified as the primary drug of concern. However, the total hospitalisation rate for 'all alcohol-related conditions' for Falcon-Wannanup residents, for the period 2008-2012, was significantly lower (0.81) than the corresponding State rate.
- 17 In respect of the characteristics of the locality surrounding the applicant's proposed liquor store, the EDPH advised that unemployment in Falcon is much higher than the State rate (7.9% compared to 4.7%) and the Socio-Economic Indexes for Areas (SEIFA) for the locality is 3, which indicates a higher than average level of disadvantage being experienced in Falcon. The SEIFA compares the relative social and economic conditions of cities, towns and suburbs across Australia and is calculated using a range of variables related to relative disadvantage, such as low income, low educational attainment, unemployment and dwellings without motor vehicles.

- 18 It was stated by the EDPH that research has shown that disadvantaged communities and people from low socio-economic groups are likely to have poorer health outcomes due to tobacco use, drinking alcohol in a high risk manner and other drug use.
- 19 In summary, the EDPH stated that packaged liquor, in general, is associated with a range of harms in the community and research has found per capita alcohol sales made by liquor stores is closely and positively related to levels of specific alcohol-related acute and long term harms. Further, packaged liquor and has been found to be associated with increased rates of:
- assaultive violence;
 - child maltreatment;
 - vehicle accidents;
 - pedestrian injuries; and
 - injuries among young adults.

The applicant's response to the EDPH and Police reports

- 20 In response to the reports, the applicant submitted that little can be gained from the data provided because it has not been compared to another location, district or State to confirm whether or not the number of offences is (on a comparative basis) lower, similar or greater than an average. The applicant stated that there are no serious offences involving violence in Falcon where alcohol was flagged as a contributing factor in the offence, and further the number of offences that have been flagged as alcohol related are low in number.
- 21 While the accuracy of the number of offences is not disputed, the applicant submitted that the base population used to calculate the rates per 1,000 population is disputed. According to the applicant, a rate per 1,000 population comparison has been adopted, so that data for the locality, sub-district, district and State can be compared, however there are a number of difficulties in accurately making those comparisons:
- first, the base population data for Falcon is low which results in any rate per 1,000 population comparison highly volatile when there is even a very minor fluctuation in the number of offences; and
 - secondly, the rates per 1,000 population comparisons for Falcon are skewed due to its actual base population being greater than the number used for the purpose of the calculations at any one time.
- 22 The applicant highlighted recent research from the NSW Bureau of Crime Statistics and Research, *The effect of liquor licence concentrations in local areas on rates of assault in New South Wales*, authored by Neil Donnelly, Patricia Menendez and Nicole Mahoney (the Donnelly research) which according to the applicant, found that

domestic assaults increased markedly when the number of hotels in a LGA exceeds two per 1,000 residents, and that a sharp increase in domestic violence coincided with an increase in packaged liquor licences but the relationship was “weaker” and the threshold was lower (0.75 per 1,000 residents).

- 23 The applicant submitted that the Donnelly research is highly relevant to the current application, as Falcon: - (a) experiences, in a statistical sense only i.e. as a rate per 1,000 population, a higher portion of domestic violence incidents; and (b) is a statistically disadvantaged area i.e. in the SEIFA indices. However, it was submitted that the Donnelly research confirms that even where those variables are present; the thresholds where the rates of domestic violence and non-domestic violence assaults increase remain the same. Consequently, the applicant submitted that even if this application was granted, the rate per 1,000 population comparison for liquor stores in Falcon will increase but only to 0.38, well below the threshold of 0.75 per 1,000 residents.
- 24 In terms of the increase in non-domestic assaults rates in Falcon since 2013 to 2015, the applicant submitted that it is common for offences to fluctuate from one year to the next and there is nothing unusual about this and there is no real evidence that this category of crime is trending upwards, as insufficient data has been provided to make that determination.
- 25 In respect of the drink driving data, the applicant submitted that the number of offences over the space of 3 years is not a significant concern and the rate is relatively stable, although there was a peak in 2014. However, the data does not suggest that there is a particular concern with drink driving in this location.
- 26 The applicant further submitted that the Mental Health Data provided by the EDPH shows a decreasing trend in the number of treatment episodes applicable to Falcon from 2013 to 2016. In terms of the Alcohol Related Hospitalisation Data, it was submitted that this was significantly lower than the State rate.
- 27 In acknowledging that Falcon is disadvantaged, the applicant submitted that this does not necessarily mean that disadvantaged areas are at risk of alcohol related harm, and this conclusion is supported by Australian based research. According to the applicant, there is no evidence that the grant of the application will have any adverse impact on existing alcohol consumption behaviour in the area. If total liquor sales are the same following the grant of this application then (other things being equal) there will be a positive impact to the extent that the existing liquor outlets will be selling less alcohol and therefore causing fewer potential negative impacts, counterbalanced by the potential negative impacts caused by sales from the BWS store.
- 28 In summary, the applicant submitted that the purchasing of alcohol with grocery items is a well-established, and desired, purchasing pattern and the consumption of liquor is a normal part of everyday life. There will be some people who abuse their right to

consume alcohol, and whilst the applicant does all it can to educate people to drink responsibly, ultimately it is the consumer's choice.

Legislative framework

- 29 In determining this application, I have been guided by the following legal principles.
- 30 An applicant for the grant of a liquor store licence must satisfy the licensing authority that the grant of the application is in the public interest (refer s 38(2) of the Act). An applicant must therefore adduce sufficient evidence to discharge this burden.
- 31 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).
- 32 The burden of establishing the validity of any objection lies on the objector (s 73(10));
- 33 The factual matters which I am 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 (refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227).
- 34 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.
- 35 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.

- 36 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.
- 37 Section 16 provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case. The licensing authority should also act without undue formality and is not bound by the rules of evidence.
- 38 Where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- 39 Section 33(1) provides that 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. Further, s 33(2)(a) provides that an application may be refused, even if the applicant meets all the requirements of the Act. In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, EM Heenan J described the 'absolute discretion' provided for under s 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] WASCA356 [6] - [7] (Wallwork J) and Palace Securities v Liquor Licensing(1992) 7 WAR 241, 249 - 250 (Malcolm CJ) 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.

Determination and reasons

- 40 For the reasons which follow, I am of the view that the grant of the application is not in the public interest. In arriving at this conclusion, I have given greater weight to the wellbeing of the local community over the marginal benefits to flow to some members of the community if the application is approved.
- 41 The proposed liquor store is to be located adjacent to a Woolworths supermarket in the Miami Plaza Shopping Centre, which is currently undergoing refurbishment and expansion. The proposed liquor store will have a total floor area of 167m² and will be a

typical convenience style liquor outlet trading under the BWS banner. The Centre is the main retail hub for residents and visitors in the area and the proposed liquor store will therefore cater to the patrons of the Centre, providing a one-stop shopping convenience for people wishing to purchase packaged liquor while undertaking other shopping at the Centre.

- 42 There was one objection to the grant of the application, from an existing licensee, whose objection was basically predicated on the view that there are already sufficient liquor outlets in the area to service the public's requirement for packaged liquor.
- 43 In terms of existing outlets in the locality, there is a large destination packaged liquor outlet (First Choice Falcon) adjacent to the Centre, on the other side of Olive Road, approximately 200 meters from the applicant's proposed liquor store.
- 44 The applicant engaged WCFS to undertake an assessment of community attitudes to the grant of the application. WCFS conducted intercept surveys of people out the front of the Woolworths supermarket in the Centre. The Liquor Commission has previously expressed reservations about the weight that may be attributed to surveys because, among other reasons, the outcome of surveys is dependent upon the method of selection and sampling of respondents, the objectivity of the surveys, the type of questions asked, and the geographical and demographical composition and nature of the locality.
- 45 One immediate observation is that the WCFS survey is naturally weighted to more frequent users of the Centre and in particular, the existing Woolworths supermarket and therefore, in my view, there may be a bias in the survey results. A further observation is that a disproportionate percentage of respondents were female (62%) and a large percentage of respondents (47%) were from a household composition of "older couple or single older person."
- 46 The survey provided the following information:
- 63% of respondents think the grant of the application is a good idea and 36% think it is a bad idea;
 - the main reason for supporting the application was convenience to buy liquor and groceries at the same time;
 - 84% of respondents had purchased packaged liquor in the last 6 months;
 - First Choice Falcon and Dan Murphy's Mandurah were the most visited stores, with 77% of respondents having been to First Choice Falcon in the last 6 months;
 - First Choice Falcon is the main store for 67% of respondents;
 - the vast majority of respondents expressed satisfaction with both First Choice Falcon and Dan Murphy's Mandurah; and

- 61% of respondents are likely to use the proposed liquor store, however only 31% are extremely likely to use the store.
- 47 It was submitted by the applicant that the granting of the licence will provide consumers with increased shopping convenience as they will be able to complete their packaged liquor purchases at the same time as completing their grocery shopping (i.e. “one-stop” shopping). The applicant further submitted that if the application is not approved, shoppers attracted to the Centre will be required to make a return trip of over 400 metres from the proposed location of the new store to the nearest liquor store.
- 48 Buss JA in *Woolworths v Director of Liquor Licensing* [2013] WASCA 227, spoke of the notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance. However, catering for this convenience, captured under object 5(1)(c) of the Act, needs to also be considered in light of the other objects of the Act and the broader public interest.
- 49 Object 5(1)(c) of the Act is to minimise harm or ill-health caused to people or any group of people, due to the use of liquor. This encompasses harm to the health and wellbeing of individuals, families and communities. Object 5(1)(a) is to regulate the sale, supply and consumption of liquor and this statutory policy of regulation is consistent with the adoption of a measured approach to the granting of licences under the Act (refer *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384).
- 50 Wheeler J in *Executive Director of Public Health v Lily Creek International & Ors* [2001] WASCA 410 said:

“The Act directs attention to the minimisation of alcohol related harm generally (s 5(1)(b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the “risk” of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made.”

- 51 Bell J in *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207, having referred to the *Lily Creek* decision, went on to observe:

“..... by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the ‘particular local, social, demographic and geographic circumstances’ of the given case.”

- 52 Therefore, the risks associated with the grant of an application must be considered not in some abstract or theoretical sense, but with regard to the proved circumstances of the particular area in relation to which the application is made.

- 53 The undisputed evidence from the EDPH is that there has been a significant increase in alcohol-related domestic assault incidents in the locality (almost double) from 2013 to 2015, which is contrary to the trend in Mandurah and the South Metropolitan District, which have either remained steady or decreased. The domestic assault offence rate per 1,000 persons in Falcon in 2013 was 3.6, increasing to 6.8 in 2015, which is almost two and a half times the State rate and is once again at odds with the trend in Mandurah, the South Metropolitan District and the State, which, over the same period, has either remained steady or declined. Although the applicant submitted that the rates per 1,000 population may be skewed, I note however that the increase in the rate per 1,000 in Falcon mirrors the increase in the actual number of alcohol-related domestic assaults in the area.

- 54 Non-domestic assault offence rates (per 1,000 persons) in Falcon have increased since 2013 (0.9), peaking in 2015 (1.9), which is higher than the State rate.

- 55 The evidence also indicates that Falcon is relatively disadvantaged (a SEIFA index of 3) with an unemployment rate well above the State rate.

- 56 In respect of the low SEIFA index for the locality, the applicant submitted that those with lower socio-economic status have less risk of drinking alcohol at risky levels, and referred to the Australian institute of Health Welfare 2013 household survey report:

“While people with lowest SES were more likely to smoke, it was people with highest SES who were more likely to drink ... and consume alcohol in quantities that placed them at risk of an alcohol-related disease, illness or injury.”

57 Whilst acknowledging the results of the above survey, the EDPH advised that, on the balance of reliable evidence, international studies have consistently found that people in lower socio-economic groups tend to have more hazardous and harmful patterns of alcohol usage. This evidence supports the conclusion that socio-economic status is a key indicator linked to alcohol-related harm and abuse in the community.

58 In terms of the high unemployment rate, the applicant stated in its PIA that:

“... higher unemployment and income levels in this location should be viewed through the prism of both lifestyle and cultural characteristics of the area which attract early retirees and the ‘sea change’ effect.”

59 However, the EDPH pointed out that while the applicant’s anecdotal theory is possible, given the higher proportion of older Australians residing in Falcon (20.6% compared to WA 12.3%), it is not reasonable to conclude, however, that unemployment rates in the area can be related exclusively to individual lifestyle choices. This is relevant given there is evidence to show the link between unemployment and poor health, which can often be associated with alcohol and drug use.

60 The applicant referenced the Donnelly research to support its contention that notwithstanding the existence of higher rates of domestic violence and relative disadvantage in an area, the threshold when an additional liquor store will impact on the rates of domestic and non-domestic violence assaults remain the same. According to the applicant, if the application is granted, the rate per 1,000 population comparison for liquor stores in Falcon will increase, but only to 0.38, well below the threshold of 0.75 per 1,000 residents.

61 It is worth noting some observations about the Donnelly research:

- it concluded that the concentration of hotel licences in an LGA, particularly at higher density levels, was strongly predictive of both domestic violence and non-domestic violence assault rates whilst a similar, but slightly weaker, association was found for the concentration of packaged licences and domestic violence and non-domestic violence assault rates;
- the authors acknowledged some limitations with their research: first there was no wholesale data to include in the regression model and secondly, the study was cross-sectional in nature and therefore the study can only answer questions about the relationship between liquor licence concentrations and assault rates in one calendar year. The authors stated that longitudinal research can help understand how changes in liquor outlet concentrations affect changes in assault rates over time; and
- the authors noted the work of Livingston (2011) which examined changes in domestic violence in Melbourne over the period 1996 to 2005. This study found that increases in total licences over this period were predictive of increases in domestic violence assault rates over time, with a particularly strong effect found

for changes in packaged licences. The authors of the Donnelly research stated that a replication of this work in the NSW context would be valuable.

- 62 The applicant sought to critique the 2011 Livingston study, suggesting it is not a robust piece of research and is flawed in many ways. The applicant also submitted that Mr Livingston has contradicted some of his 2011 findings in 'other research'. The 'other research' referred to by the applicant was conducted in 2010, in which it was stated that there is no significant association between packaged licence density and domestic violence rates. In the 2010 study, Mr Livingston noted that the study was limited by its use of police data, which was likely to underestimate the true rate of domestic violence and may lead to biases in the findings. He also noted the lack of relationship between packaged liquor density and domestic violence was surprising in the context of the theory that increased availability of packaged liquor leads to increased consumption in the home, which may increase the risk of incidents of domestic violence. Consequently, Mr Livingston acknowledged that the 2010 study can only have tentative implications for policy. He further went on to state that *"While this paper has provided a first step in that direction, there remain uncertainties about the precise nature of this relationship. Future studies making use of longitudinal data are required to better understand the influence of alcohol availability on domestic violence."* Mr Livingston then went on to conduct the 2011 longitudinal study, concluding that there was a strong correlation between packaged liquor outlet density and domestic violence.
- 63 Mr Livingston has also noted other studies which concluded that there was a high correlation between domestic violence rates and levels of socio-economic disadvantage.
- 64 Ipp J in *Lilly Creek* stated that evidence which merely establishes a potential for harm or ill-health is relevant and must be taken into account, even though that evidence does not establish that harm or ill-health will result on the balance of probabilities. His Honour further stated:

"Whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to in Malec v JC Hutton Pty Ltd, is essentially a matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.

In my opinion, where the degree of probability is less than 51 per cent, it does not follow that the possibility of such harm or ill-health is to be ignored. In my view, there is nothing in the wording of s 5(1)(b) that leads to such a view. On the contrary, the public interest considerations that underlie s 5(1)(b) indicate that the potential of harm or ill-health is to be taken into account irrespective of whether the prospect of harm or ill-

health is a possibility or a probability. The wording in s 69(8a) is also indicative of the intent to this effect.

Section 33 of the Act confers upon the Licensing Authority an absolute discretion to grant or refuse an application on any ground that the Licensing Authority considers in the public interest. The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on the balance of probabilities, would be a powerful public interest consideration. The section is therefore consistent with the view that the mere possibility of harm or ill-health would always be a relevant matter for the Licensing Authority when discharging its functions.”

65 The evidence establishes, in my view, a conflict in promoting the various objects of the Act. In such circumstances, I must weigh and balance the competing interests in each case (refer *Lily Creek*).

66 In terms of this application, the competing interests are the benefits to some members of the community for an increased level of convenience in purchasing packaged liquor when shopping at the Centre, compared to the risks of introducing a convenience style packaged liquor outlet in a locality which is relatively disadvantaged and where there is presently a high rate of alcohol-related domestic violence, which appears to be trending upwards.

67 In my view, the extent of the cumulative benefits to the public through the added convenience of purchasing packaged liquor from the applicant's proposed premises is diminished to a great extent by the close proximity (approximately 200 meters) of First Choice Falcon. The applicant's own evidence (respondents to the WCFS survey) establishes that First Choice Falcon is popular with users of the shopping centre, with high satisfaction ratings in terms of price, product range and service.

68 First Choice Falcon is a large destination outlet, with a significantly larger range of products on offer than what the applicant proposes. The grant of the application would not be adding to the diversity of liquor products in the area.

69 In LC 18/2015, the Liquor Commission observed at [125] to [129] that:

“Convenience is just one factor to be considered when considering the requirement of consumers for liquor - under the current Act it must be considered having regard to the proper development of the liquor industry, the other objects of the Act and, of course, the public interest.

It is accepted in the community, as evidenced by the many and varied shopping centres and precincts, that there may be some level of inconvenience experienced in purchasing liquor.

Liquor is a product that may have negative consequences in the community and is subject to extensive regulation as to its sale, supply and

consumption. These controls and restrictions exist for the benefit of the community and whilst some members of the community may express a desire for more convenience, the Commission is entrusted with the responsibility of making a determination on whether the public interest is served by any proposal to widen or extend the level of convenience currently enjoyed by the public by the extension or granting of certain licences.

Many shopping centres and precincts, for example, have independent liquor stores quite removed from the local supermarket, and, for that matter, removed from the bakery, post office, bank, butcher or other retail outlets or public utilities regularly frequented as part of a person's or family's weekly or regular shopping expedition. Some liquor stores are even located in relatively isolated areas separate from a shopping centre or precinct.

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."

- 70 Object 5(1)(a) of the Act is to regulate the sale, supply and consumption of liquor, and this statutory policy of regulation is consistent with a measured approach to the granting of licences under the Act (per Heenan J in *Woolworths Limited v Director of Liquor Licensing* [2012] WASC 384). In LC 18/2015, the Liquor Commission, having quoted with authority the words of Heenan J in *Woolworths*, went on to state:

"A measured approach requires a careful consideration of the broader public interest and simply because a service is as convenient, or more convenient than that currently available, does not, of itself, satisfy the primary and secondary objects or the public interest as specified in the Act.

Proper development of the liquor industry 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 long term interests of (the – sic) liquor industry are best served by a controlled development of the industry having regard to public perceptions of the industry and the overall health and well being of the community."

- 71 The evidence establishes that Falcon is relatively disadvantaged, with high unemployment rates and increasing rates of domestic violence, which are significantly higher than the State rate. Alcohol is a major contributor to rates of domestic violence

in the community and there is a positive relationship between the availability, level of consumption, and harm and ill-health resulting from the use of liquor. In discharging its functions under the Act, “*the mere possibility of harm or ill-health*” is a relevant matter for the licensing authority to consider (per Ipp J in *Lily Creek*). Further, Edelman J in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51, stated that in assessing the question of whether granting an application is in the public interest, it is a relevant consideration that there are existing ‘at risk’ persons who might be further affected.

72 Harm associated with packaged liquor occurs away from the licensed premises and although effective management practices may be a component of addressing the health issues in relation to alcohol, in effect, however, they have limited benefits in addressing the harms that may occur in the home or place of consumption.

73 In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:

“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.”

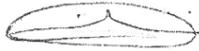
74 In the exercise of its discretion under the Act, and acting in the public interest, it is a matter for the licensing authority to decide what weight to give to the competing interests (refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356). In this regard, the licensing authority is required to take a balanced approach to the granting of new applications and should not undertake this task on the basis of any legal or factual presumption in favour of a grant of a licence or any view that the commercial interests of an applicant are necessarily coincident with the public interest.

75 An applicant has an obligation under s 38(2) to satisfy the licensing authority that the grant of the application is in the public interest and so imposes a burden of persuasion to that extent which must be satisfied by the evidence adduced in any particular case.

76 The evidence establishes, in my view, the possibility that the grant of the application may negatively impact on the local community, particularly when the local social and demographic profile of the community is taken into consideration (refer *Kordister* per Bell J). In weighing and balancing the competing interests in this case, I am of the view that the potential negative impact of introducing a further convenience style packaged liquor outlet in this locality outweighs the marginal benefits, of an increased level of convenience, to some members of the community. The applicant’s evidence does not satisfy me that the welfare of the local community would not be adversely impacted by the grant of the application.

77 I therefore find that the applicant has failed to discharge its burden under s 38(2) of the Act and the grant of the application would not be in the public interest.

- 78 Consequently, in the exercise of my discretion under s 33(1) of the Act, the application is refused.
- 79 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.
- 80 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