

DECISION OF DIRECTOR OF LIQUOR LICENSING

MATTER: APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

APPLICATION ID: A000239915

PARTIES: WOOLWORTHS LIMITED (APPLICANT)
COMMISSIONER OF POLICE (INTERVENOR)
BRIGHTON TAVERN GROUP PTY LTD (OBJECTOR)

PREMISES: BWS - BEER WINE SPIRITS BUTLER, BUTLER CENTRAL SHOPPING CENTRE, AT THE CORNER OF BUTLER BOULEVARDE AND EXMOUTH DRIVE, BUTLER

DELEGATE: B. SNELL
A/DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 08 DECEMBER 2017

Preamble

1. On 23 June 2017, the Applicant applied to the Director of Liquor Licensing (the Director) for the conditional grant of a liquor store licence for premises to be known as *BWS - Beer Wine Spirits Butler* and situated at Butler Central Shopping Centre, at the corner of Butler Boulevarde and Exmouth Drive, Butler.
2. That application was made pursuant to ss 41 and 62 of the *Liquor Control Act 1988* (the Act) and was advertised in accordance with instructions issued by the Director, which lead to the lodgement of the notice of intervention, pursuant to s 69 of the Act and the notice of objection, pursuant to s 74 of the Act.
3. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties.
4. As this is an administrative decision, rather than referring in detail to the entirety of the evidence before me, I will set out what I consider to be the relevant material facts. I will also outline the process of my reasoning from consideration of those material facts to conclusion, setting out the differing positions advanced by the parties. Where there has been conflict in submissions that has been significant to the outcome, I will provide reasons why I have preferred one position over another.

The Application

5. To support its application and to help discharge its onus under s 38 of the Act, the Applicant lodged a Public Interest Assessment (PIA) in which it was submitted that the proposed premises will be a modern, browse-style store that will operate under the Applicant's *BWS-Beer Wine Spirits* (BWS) brand.

6. It was further submitted that the proposed store will complement the Woolworths Supermarket, as part of the new Butler Central development, which will be a major new development in the Butler District Centre.
7. Accordingly, the Applicant submitted that the proposed liquor store will cater to those customers of both the supermarket and the Centre as a whole, who want to purchase packaged liquor at the same time as they purchase groceries and/or other shopping at the Centre.
8. Overall, the proposed premises will comprise an area of 202 m², which will include:
 - (a) 154 m² of trading floor;
 - (b) a walk-in cool-room of 37 m²; and
 - (c) an administration and stockroom area of 11 m².
9. The Applicant's PIA:
 - (a) was supported by a town planning report, an Environmental and Health Assessment, a Market Survey report and an analysis of Crime and Health Statistics for the locality; and
 - (b) also provided information on the surrounding locality, demographics of the locality; outlet density and generally addressed those matters prescribed in ss 5 and 38(4) of the Act.
10. In conclusion, the Applicant submitted that BWS is a well-established, national retail liquor brand that is focussed on providing convenient retail packaged liquor services and facilities. It was also submitted that Woolworths is a highly reputable, well-managed company, which does all that it can to ensure that liquor sales are conducted in the most responsible manner, while striving to surpass industry standards of compliance.

The Intervention

11. The Intervenor made representations on:
 - (a) the question of whether, if the application is granted, public disorder or disturbance would be likely to result (s 69(6)(c)(ii) of the Act refers); and
 - (b) any other matter relevant to the public interest (s 69(6)(c)(iv) refers).
12. Accordingly, the intervention sought the imposition of trading conditions on the licence (if granted) to assist in minimising consequential harms and anti-social behaviours generally attributed to licensed premises and to ensure that the Applicant adheres to the intended manner of trade outlined in its PIA.

The Objection

13. The Objector, who declared a pecuniary interest as the licensee of The Cornerstone Ale House, objected to the application on every ground permitted by s 74(1) of the Act, submitting that:
- (a) the locality is already well serviced by packaged liquor outlets;
 - (b) the inclusion of the proposed premises at Butler Central would further normalise alcohol and increase the exposure of young people to alcohol – including young people at risk of alcohol related harm; and
 - (c) alcohol fuelled violence can cause a negative impact to the amenity of any locality and the grant of the application would not be in keeping with the objects of the Act regarding the proper development of the liquor industry and other hospitality industries in the State.
14. The Objector also asserted that:
- (a) the market dominance of national chains like Coles, Woolworths and ALDI means that smaller, independent liquor store operators are being forced out of the liquor industry, which is not consistent with the public interest; and
 - (b) a district centre is smaller and provides fewer amenities than both strategic centres and secondary centres and that strategic centres are already operating in Joondalup and Yanchep, with secondary centres in Alkimos and Two Rocks North.

Determination

15. An applicant for the grant of a licence must satisfy the licensing authority that the grant of the application is in the public interest and must therefore adduce sufficient evidence to discharge this burden.¹
16. Similarly, the Act provides that the burden of establishing the validity of any objection lies on the objector.²
17. The Intervenor, on the other hand, carries no burden of proof, but rather provides submissions to assist the licensing authority to make an informed decision.³
18. In determining whether the grant of an application is in the public interest, I am required to exercise a discretionary value judgement confined only by the scope and purpose of the Act.⁴

¹ *Liquor Control Act 1988*: s 38(2)

² *supra*, s 73(10)

³ see Greaves J, *Re Gull Liquor* (1999) 20 SR (WA) 321

⁴ *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 Ore Pty Ltd* (2007) WASCA 175

19. In so doing, the factual matters that I am bound to take into account are those relevant to the primary and secondary objects of the Act, as set out in s 5.⁵
20. The primary objects of the Act are:
- (a) to regulate the sale, supply and consumption of liquor; and
 - (b) to minimise 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 sectors in the State.
21. The secondary objects of the Act are:
- (a) 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;
 - (b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of the Act.
22. In considering the public interest, I am also entitled to consider the factual matters set out in s 38(4) of the Act.⁶
23. Further, in proceedings under the Act, I am required to act:
- (a) according to equity, good conscience and the substantial merits of each case; and
 - (b) without undue formality.
24. As a delegate of the Director, I am not bound by the rules of evidence, but make my determination on the balance of probabilities.⁷ In circumstances where conflict arises in promoting the objects of the Act, I must weigh and balance the competing interests in each case.⁸ Therefore, it is a matter for me to decide what weight to give to the competing interests and other relevant considerations raised by the parties.⁹
25. In response to the intervention and objection, the Applicant submitted that:

⁵ ***Woolworths Ltd v Director of Liquor Licensing*** [2013] WASCA 227

⁶ *supra*

⁷ *Liquor Control Act 1988* (WA): s 16

⁸ ***Executive Director of Health v Lily Creek International Pty Ltd & Ors*** [2000] WASCA 258

⁹ ***Hermal Pty Ltd v Director of Liquor Licensing*** [2001] WASC 356

- (a) the proposed premises has been designed to cater for the weekly and daily shopping needs of residents and visitors to the locality, who will be able to purchase packaged liquor at the same time as doing their grocery and other shopping at the centre;
 - (b) results of the Market Survey demonstrate that shoppers for packaged liquor in the locality will use the proposed premises, with 84% of respondents stating they would be likely to use the premises, with “convenience” being the overwhelming reason to do so;
 - (c) the Butler District Centre will be the highest order centre in the locality and the pre-eminent shopping centre for the region for many years;
 - (d) there is nothing to suggest the population of the locality suffers a high or unacceptable level of liquor-related harm or ill-health, nor that the proposed manner of trade at the proposed premises will exacerbate the risk of harms to any “at-risk” person or group in the locality;
 - (e) consumers of packaged liquor require a variety of retail packaged liquor outlets as there are different and distinct consumer segments and preferences; and
 - (f) the Applicant has a long-standing and demonstrated track record in operating BWS stores in a responsible manner.
26. Whilst acknowledging there is no onus on the Intervenor to establish its assertions of fact or opinion, the Applicant submitted that the statutory provisions expressly limit the matters upon which an intervenor may intervene, to the matters that fall within the intervenor’s scope of knowledge and expertise.
27. In relation to the objection, the Applicant submitted no compelling or probative evidence was provided to support the objection. Further, the Applicant alleged that the objection has been motivated to protect the commercial interests of the Objector and its related companies, who together own and/or operate not only the Cornerstone Ale House, but also the Cornerstone Liquor Store, Butler Specialty Cellars and the Alkimos Tavern (for which a related company has recently been conditionally granted a tavern licence.)
28. In assessing concerns about harm or ill-health, the licensing authority must follow the approach set out by Allanson J¹⁰, that is:
- (a) make findings that specifically identify the existing level of harm or ill-health in the relevant area due to the use of liquor;
 - (b) make findings on the likely degree of harm to result from the grant of the application;
 - (c) assess the likely degree of harm to result from the grant of the application against the degree of harm; and

¹⁰ *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

- (d) weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant has established that it is in the public interest to grant the application.
29. In this regard, the Applicant submitted that the baseline level of harm and ill-health for the locality is not high or unacceptable and the potential for any increase is extremely small, which is a position that I accept.
30. In accordance with the observations of Buss JA¹¹, a proper construction of the Act obliges the licensing authority to determine an application in accordance with the evidence (including notorious facts) before it and the criteria imposed by the Act. This statutory duty requires two aspects:
- (a) first, the licensing authority must evaluate the evidence before it and make findings and draw conclusions from the evidence, including by inference (an inference is an affirmative conclusion which arises from facts that have been established); and
- (b) secondly, the licensing authority is required to apply the public interest criterion to the relevant circumstances; to any findings made and to any conclusions drawn.
31. In my view, the Applicant's evidence establishes that:
- (a) the Woolworths business model is popular elsewhere in suburban Australia and from this evidence, it can and should be inferred, that there is a consumer requirement for the proposed range of liquor products in the Butler locality;
- (b) the proposed liquor store will provide a range of liquor products (approximately 1,610, including beer, cider, wine, bottled spirits and RTDs), which are focused on popular brands that are familiar and well-known; and
- (c) in the circumstances, it is in the public interest to grant the Applicant's application, particularly in order to meet the relevant consumer requirements and to advance the development of the liquor industry in the locality in a way which reflects the diversity of those requirements.
32. I have also noted, as explained by Buss JA¹², that it is a notorious fact in contemporary Australian life that one-stop shopping in large suburban shopping centres is of great importance and that this social fact is reflected in the development of district and regional shopping centres. A shopping centre, which has a status of a 'District Centre' under the hierarchy of commercial centres established by Planning Policy Statement number 4.2 of the Western Australian Planning Commission, is expected to meet the weekly shopping needs of suburban communities on a one-stop shopping basis. Therefore, I accept the submissions of the Applicant that the Butler Central Shopping Centre will be capable of providing for the weekly shopping needs, on a one-stop shopping basis, to residents of the locality, a fact that will be further facilitated by the grant of the application.

¹¹ ***Woolworths Ltd -v- Director of Liquor Licensing*** [2013] WASCA 227

¹² *supra*

33. Therefore, I consider there is little substance to the Objector's assertions regarding the Butler District Shopping Centre being a district centre.

34. In relation to the Objector's assertions regarding market dominance, I note that a similar issue was considered by the Liquor Commission¹³, where it was observed that:

"The creation of a monopoly or duopoly in liquor retail such that it would crush competition offered by smaller outlets is a relevant consideration when determining the issue of public interest. A situation in which one or two retailers completely dominate the liquor market would not be in the public interest. However, there is no evidence before the Commission, either direct or circumstantial, from which the Commission could conclude that the granting of this application would have a crushing effect on other liquor outlets or that a point has been reached within the Perth metropolitan area that the two large liquor outlets... so dominate the market that other retailers are unable to compete and as such a monopoly or duopoly has been created. There is no evidence before the Commission as to how previous grants of licences to the applicant has affected other liquor retailers. In the absence of such evidence, the Commission cannot conclude that the granting of this application would be contrary to the proper development of the liquor industry and not in the public interest."

35. Accordingly, I would likewise find that the relevant assertions of the Objector in these proceedings are not supported by the requisite probative evidence.

36. The remaining grounds of objection are based upon two broad contentions. First, there are sufficient liquor outlets in the locality to meet the requirements of consumers for liquor and therefore a further liquor store is not required, and secondly, the grant of the application is likely to have a negative impact on the amenity of the locality.

37. In 2007, the Act was amended to remove what was colloquially referred to as 'the needs test'. One of the related grounds of objection, prior to the amendments, was that the grant of the application was not necessary in order to provide for the requirements of the public. This was often used by existing licensees as a means of trying to limit competition in the market place. The 2007 reforms to the Act were intended to abolish the anticompetitive public needs test and replace it with a broader public interest test, which put the interests of the public at the forefront of deciding whether to grant a licence or not. During the second reading of the *Liquor and Gaming Legislation Amendment Bill*, the then Minister for Racing and Gaming said that the Bill sought to:

- (a) put the interests of consumers at the forefront;
- (b) promote innovation and diversity in the way liquor services are provided to consumers; and
- (c) add a higher emphasis on the needs of consumers.

¹³ *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)

38. Therefore, I do not consider it is particularly germane or determinative in these proceedings that the Objector has merely asserted that there are sufficient existing licensed premises in the locality, particularly when contrasted with the level and nature of the consumer evidence relied upon by the Applicant.
39. In assessing the general assertion by the Objector that the grant of the application poses risks to the amenity of the locality, it is not the risk of harm in some abstract sense that is relevant, but rather an assessment of risk with regard to the proven circumstances of the area to which the application relates.¹⁴ In this regard, I note the Objector did not undertake any such analysis, electing instead to rely upon comments by the Chief Health Officer in unrelated proceedings and references to publications by third parties.
40. Therefore, in the context of these proceedings, there is nothing in the submissions of the Objector that would lead to a conclusion that the grant of the application poses an unacceptable risk to the amenity of the locality. I therefore find that the grant of the application would not be inconsistent with the Act's harm minimisation objects.
41. In relation to the representations of the Intervenor, notwithstanding the Applicant's submission that it has decided to install lockable glass cabinets for displayed bottled spirits as part of the fit-out of the proposed premises and that a sophisticated CCTV system will be installed at the premises, it nonetheless opposed the imposition of such conditions on the licence, because none of its other licences have similar conditions endorsed on them and/or the imposition of this approach would be inconsistent with the approach taken by the Director in respect of the Applicant's other licensed premises.
42. However, pursuant to s 33(2) of the Act, the present application is required to be dealt with on its own merits, based on the submissions of the parties.
43. After weighing and balancing the competing interests in these proceedings, I am satisfied that the Applicant has discharged its onus under s 38(2) of the Act and the grant of the application is in the public interest. It therefore follows that the Objector has failed to make out its grounds of objection, as required under s 73(10).
44. A liquor store licence is therefore conditionally granted to the Applicant, subject to the following:
- (a) a Certificate under s 39 of the Act being lodged before the operation of the licence;
 - (b) compliance with the *Local Government Act 1995, Health (Miscellaneous Provisions) Act 1911* and any written law relating to the sewerage and drainage of these premise;
 - (c) all work being completed within 12 months in accordance with the plans and specifications dated 23 June 2017;
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements, dated 21 July 2017, being satisfactorily completed and the Director

¹⁴ *Executive Director Public Health v Lily Creek International & Ors* [2001] WASCA 410

- of Liquor Licensing being notified in writing at least 21 days prior to applicant wishing to trade under the licence;
- (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the Applicant seeking confirmation of the grant on or before 07 December 2018, pursuant to s 62(4)(c) of the Act.
45. On confirmation of the conditional grant, the following conditions will be imposed on the issue of the licence:
- (a) Trading hours:
 - (i) The permitted trading hours are those prescribed in s 98D of the Act. In this respect, only liquor stores located in the metropolitan area are permitted to trade on Sundays.
 - (b) Trading conditions:
 - (i) The licensee is authorised to sell and supply packaged liquor in accordance with the provisions of s 47 of the Act.
 - (ii) The licensee is to have and maintain a CCTV system in accordance with the policies of the Director.
 - (c) Compliance with Harm Minimisation policy:
 - (i) The licensee is to have a House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.
46. Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
47. The Applicant is reminded that trading **may not** commence without the prior written approval of the licensing authority.
48. 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.
49. This matter has been determined by me under delegation pursuant to s 15 of the Act.


DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING