

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: SUBIACO ENTERPRISES PTY LTD

OTHER PARTIES: COMMISSIONER OF POLICE (OBJECTOR)
MS PENELOPE OLDFIELD (OBJECTOR)
CHIEF HEALTH OFFICER (INTERVENOR)

PREMISES: CRUST GOURMET PIZZA SUBIACO

PREMISES ADDRESS: T6, 502 HAY STREET, SUBIACO

APPLICATION ID: A000255601

MATTER: APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR
STORE LICENCE

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 10 AUGUST 2018

Introduction

- 1 This is an application by Subiaco Enterprises Pty Ltd (the applicant) for the conditional grant of a liquor store licence for premises to be located at T6, 502 Hay Street, Subiaco and to be known as Crust Gourmet Pizza Subiaco. 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. Objections to the grant of the application, in accordance with ss 73 and 74 of the Act, were lodged by the Commissioner of Police (the Commissioner) and Ms Penelope Oldfield. The Chief Health Officer (CHO) intervened in the application as permitted under s 69 of the Act.
- 3 The application will be determined on the written submissions of the parties as permitted under ss 13 and 16 of the Act. In addition, this decision has been prepared and should be read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹

Summary of the applicant's proposal

- 4 The applicant currently operates a Crust Gourmet Pizza outlet in Subiaco and provides pizzas for dine-in customers, as takeaway and for delivery. In addition to pizzas, the applicant provides its customers with ancillary products such as cool drinks, water and juice.

¹ Refer s 16(7) of the Act.

-
- 5 The applicant proposes to only sell packaged liquor to customers who have ordered a pizza for takeaway or delivery. Customers will be restricted to purchasing liquor in the following manner:
- a six pack of beer or cider;
 - a four pack or six pack of selected RTD's; and
 - a bottle of wine or champagne.
- 6 In terms of its delivery service, the applicant submitted that each Crust Gourmet Pizza venue is allocated a territory by the franchisor and pizza deliveries are restricted to addresses within this territory. Consequently, packaged liquor deliveries will be limited to persons within this allocated pizza delivery territory.
- 7 The proposed liquor store will feature a single refrigerator which will display chilled liquor products for the convenience of customers when purchasing takeaway pizzas. The refrigerator will be locked to prevent juveniles from reaching the liquor.
- 8 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA included details on:
- the applicant's proposed manner of trade;
 - demographics of the locality;
 - proposed style of operation;
 - existing licensed premises in the area; and
 - likely impact on the amenity of the locality; and
 - why the grant of the application is in the public interest.
- 9 The applicant also submitted various witness questionnaires from members of the public who support the application and indicated that they may purchase packaged liquor with their takeaway pizza.
- 10 It was submitted by the applicant that the grant of the application is unlikely to increase the existing level of alcohol-related harm in the community because:
- by contemporary standards it is a very small liquor store;
 - the packaged liquor service is very much ancillary to the main purpose of selling gourmet pizzas;
 - there will be no consumption of liquor on the premises;
 - no live entertainment is proposed;
 - the applicant proposes very strict trading conditions to ensure no liquor service to juveniles or intoxicated people; and
 - this application is at the passive end of liquor licence approvals.
- 11 According to the applicant, it will adopt various harm minimisation strategies which include proposed trading conditions for the licence, installing a CCTV system and displaying responsible service of alcohol messages in the venue.

12 The applicant proposed the following trading conditions for the licence:

- packaged liquor may only be sold to customers ordering pizzas for takeaway or delivery;
- there is to be no consumption of liquor on the premises;
- packaged liquor may only be sold in the following quantities per pizza order:
 - a six pack of beer;
 - a four pack or six pack of selected ready to drink products; or
 - a bottle of wine or champagne,
- the permitted trading hours are 11 a.m. to 10 p.m. Monday to Sunday;
- there is to be no trading on Christmas Day, Good Friday or before 12 noon on ANZAC Day;
- packaged liquor may not be delivered to persons under the age of eighteen or persons who fail to provide acceptable proof of age;
- if there is no-one at the delivery address over the age of 18 to accept the order, the licensee must not deliver the packaged liquor and must retain it, and re-organise delivery with the customer; and
- no packaged liquor is to be left unattended at a delivery address and all deliveries are to be signed for, and the licensee must keep an accurate record of the person who accepted the delivery.

13 It was submitted by the applicant that some members of the local community who lead busy and time poor lifestyles would appreciate the convenience of buying their packaged liquor with their pizza and while the application does not relate to a liquor store in combination with a supermarket, it does relate to combining a food offer with a liquor offer and would afford the convenience of removing the requirement for customers to make a second stop to obtain their packaged liquor requirements.

Summary of the objections

Commissioner of Police

- 14 The Commissioner objected to the application on the basis that the grant of the application would not be in the public interest.²
- 15 According to the Commissioner, the applicant has failed to sufficiently address the harm and ill-health impacts to the community or the impact on the amenity of the area if the application is approved. It was further submitted that the grant of the application would increase the volume of liquor delivered to homes increasing the potential for alcohol-related harm to occur. In this regard, it was submitted that the proposed delivery service would be problematic to regulate and enforce and there appears to be no age verification practice in any online purchase via the applicant's current online ordering system.
- 16 The Commissioner submitted that the consumer questionnaires lodged by the applicant in support of its application provides minimal indication of consumer requirements when

² Section 74(1)(a)

considered in the context of the population of the area and there are discrepancies in some of the responses. The Commissioner also questioned the probative value of the questionnaire because it does not identify how the proposed premises would cater for the requirements of consumers only that it would offer a marginal convenience to some consumers.

- 17 According to the Commissioner, increasing the availability of alcohol can have a direct correlation to an increase in harm and crime in a locality. Alcohol is a substantial contributor to family violence (domestic assaults) and there has been a significant increase of incidents of family violence from 2009 to 2015 in the State. In all reported family violence offences where liquor consumption was a factor, the leading place for consuming liquor was in the home.
- 18 The Commissioner also submitted that the applicant proposes to force people to buy a minimum amount of alcohol (i.e. four pack or six pack) and customers attending the premises on foot who wish to purchase alcohol would not have any flexibility regarding the quantity of liquor they purchase and those persons may have no place to consume the alcohol within the immediate area. This could result in persons consuming liquor in nearby parks with their pizza, which is unlawful, and could also result in an increase in disorderly behaviour due to the consumption of liquor.
- 19 The Commissioner also expressed concern that juveniles may use the service to obtain liquor, with the onus left on the delivery driver to assess the age and level of intoxication of the person accepting the order. Although acknowledging the delivery of liquor is already occurring in WA, it was submitted by the Commissioner that most delivery services come with a long wait time and/or a delivery fee
- 20 According to the Commissioner, this application needs to be treated with a degree of caution, and notwithstanding that each application is based on its merits, the grant of the application has the potential to increase the amount of liquor store licence applications from any food delivery service, including but not limited to McDonalds, Hungry Jacks, Chicken Treat, Red Rooster, Dominos Pizza, Pizza Hut, Grilled and Jus Burgers. Within 500 meters of the applicant's proposed liquor store, there are six existing liquor stores and three taverns which are able to provide packaged liquor to the community.
- 21 Given that the applicant operates a small pizza shop, it was submitted by the Commissioner that the limited variety of liquor products on offer would afford an insignificant contribution to the level of convenience to the public and the grant of the licence is not consistent with the proper development of the liquor industry.

Ms Oldfield

- 22 Ms Oldfield submitted that the grant of the application would not be in the public interest and noted that there is an existing liquor store within a one-minute walk of the applicant's proposed premises. It was also submitted that the grant of the application may result in other pizza shops seeking to deliver liquor with their pizzas.

- 23 To support her objection, Ms Oldfield submitted a letter from the Executive Director of the Australian Medical Association (AMA) in which it was stated that:
- excessive consumption of alcohol is the source of significant health, social and economic harms, particularly amongst young Australians;
 - by world standards, Australia's per capita consumption of alcohol is high;
 - one in five Australians consume alcohol at levels that put them at risk for alcohol-related disease or injury and a further 70 per cent of Australians report being adversely affected by others' drinking;
 - almost one in four young people aged 14-19 drink alcohol at levels associated with short-term harm on a monthly or weekly basis, and over 40 per cent of those aged 16-24 years report having consumed more than 20 standard drinks on a single occasion;
 - alcohol is causally linked to over 60 different medical conditions and its excessive consumption contributes to preventable deaths, chronic disease, mental illness and injury;
 - in addition to the health impacts, the misuse of alcohol imposes significant social and economic costs, including crime, violence, reduced workplace productivity, vandalism, offensive behaviour, and dysfunctional family dynamics; and
 - the total cost of alcohol-related harms in Australia are estimated to be between \$15 and \$36 billion each year.
- 24 According to the AMA, given the impact of alcohol-related harms, there is a pressing need for policy interventions that reduce the burden of injury, illness and death associated with alcohol consumption. It was submitted by the AMA that approving takeaway and home delivery food outlets to sell alcohol as presented in this application will only add to the burden of harmful or hazardous drinking.

The intervention

- 25 The CHO intervened in the application to make representations and submissions on the following:
- the application will increase the focus of alcohol in the context of a fast-food style environment by offering delivery of alcohol and pizza orders for immediate consumption;
 - the risk of harm is increased given the application will:
 - offer alcohol as an option to purchase in a situation where alcohol purchase may not have been considered otherwise;
 - provide an opportunity and easy access for people who may have already been drinking alcohol to purchase more alcohol when they may not have otherwise; and
 - present circumstances where staff may be at risk of harm when required to refuse service without support at private homes to people who are underage or drunk. Thus, responsible service may be less likely due to personal safety concerns;

-
- in the context of increased risk of impulse purchasing, it is relevant to consider that packaged liquor consumption has been found to be associated with increased rates of harm, including domestic and family violence; child maltreatment, vehicle accidents, and injuries amongst young adults; and
 - the applicant has provided limited information in respect to the assessment of patrons and responsible service in the application.
- 26 According to the CHO, the manner and context in which alcohol is made available within the community impacts on views of what is deemed normal in terms of drinking patterns and behaviour. It was submitted that the applicant seeks to position alcohol within the fast-food setting in such a way that is intended to be perceived as a convenient shopping experience. There are established harms associated with increased ease of access to alcohol.
- 27 The CHO also submitted that the grant of the application increases the potential for customers of Crust Subiaco to purchase alcohol when they would otherwise not have considered doing so. Such circumstances also present difficulties for those at-risk or already experiencing alcohol-related problems.
- 28 According to the CHO, the application presents a unique set of circumstances that increase the risk of harm from a responsible service perspective. Unlike a standalone packaged liquor outlet, patrons of Crust Subiaco will have access to alcohol via a prompt delivery service from a traditionally alcohol-free fast-food venue. It was submitted that the applicant's delivery person may be less likely to assess the age of customers intending to consume the liquor given they will be on their own, will have potential personal safety concerns if the person is aggressive or intoxicated, and the time sensitive nature of the fast-food delivery service. Also, evidence shows that younger staff aged between 18 to 24 years were more likely to sell alcohol to buyers without asking for identification, which raises concerns about the capacity of delivery staff to implement key responsible service strategies.
- 29 The CHO noted that the applicant proposes to display alcohol in a refrigerator in the customer service area of the store next to a soft drinks refrigerator. It was submitted that the location of the display refrigerator ensures that the alcohol will be highly visible in an area of the store that receives a high volume of customer traffic and its co-location next to a soft drink refrigerator promotes impulse purchasing and impacts on the attitudes and behaviours in respect to alcohol.
- 30 In conclusion, it was submitted by the CHO that there are harm and ill-health concerns based on the combination of some high-risk characteristics associated with the application. At a minimum, if the application is approved, conditions should be imposed on the licence to minimise the potential risks to the community.

Determination

- 31 An applicant for the grant of a liquor store licence under the Act must satisfy the licensing authority that the grant of the application is in the public interest.³ Consequently, there is no presumption in favour of the grant of the application and the applicant must adduce sufficient probative evidence to discharge this burden.
- 32 For the reasons which follow, I am of the view that the applicant has failed to discharge its onus under the Act and satisfy me that the grant of the application is in the public interest.
- 33 The applicant seeks the grant of a liquor store licence to facilitate the sale of packaged liquor with its takeaway and delivery pizzas. According to the applicant, the provision of packaged liquor is intended as an ancillary service to customers of its pizza business and will provide its customers with the convenience of obtaining packaged liquor when purchasing takeaway pizzas.
- 34 It was stated by the applicant in its PIA that the franchisor of Crust Gourmet Pizzas, CPG Systems Pty Ltd, has made a business decision to adapt its business model to suit the convenience demanded by its customers nationwide and add packaged liquor as a service to takeaway and delivery pizza customers. It has instructed its franchisees in each State and Territory to make applications for liquor licences to allow this service to be added to their product range.
- 35 It is immediately apparent that this application is not a business decision of the applicant, rather, the application has been made under instructions from the franchisor. I also note that the franchisor has lodged an application to share in the profits from the sale of liquor if the licence is granted.
- 36 In ***Carnegies Reality Pty Ltd v Director of Liquor Licensing*** [2015] WASC 208, Allanson J summarised the functions of the licensing authority, as examined by the Court of Appeal⁴, in the following way:
- by s 16, s 30A, s 33 and s 38, the licensing authority is required to determine the application in accordance with the Act;
 - by s 38(2), the applicant must 'satisfy' the licensing authority that the granting of the application is 'in the public interest';
 - the expression 'in the public interest' imports a discretionary value judgement, confined only by the scope and purpose of the statute;
 - in determining whether it is satisfied that the granting of the application is 'in the public interest', to the extent that those matters arise on the evidence (including notorious facts), the licensing authority is:
 - a) bound to take into account those matters relevant to the objects of the Act; and
 - b) entitled to take into account those matters set out in s 38(4); and

³ Section 38(2)

⁴ ***Woolworths Ltd v Director of Liquor Licensing*** [2013] WASCA 227

- the licensing authority's obligation to take into account the public interest in that manner is not diminished by s 33(1). The absolute discretion in that section is subject to the Act. Section 33 does not confer on the licensing authority an arbitrary or unlimited power or permit the licensing authority to grant or refuse an application other than consistently with the objects and other provisions of the Act.
- 37 The primary objects of the Act, as set out in s 5 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.
- 38 In determining whether the grant of the application is in the public interest, conflict may arise in promoting the various objects of the Act. When such conflict arises, the licensing authority must undertake a weighing and balancing exercise and the decision will depend on the particular facts and circumstances of each case⁵, however it is a matter for the licensing authority to decide what weight to give to the competing interests.⁶
- 39 In respect of this application, the evidence presented establishes that:
- packaged liquor will only be sold to persons who have ordered a takeaway pizza;
 - if the customer has not walked into the premises, packaged liquor will be delivered to the person's residents with the pizza;
 - the applicant proposes to offer a very limited selection of liquor;
 - people can only buy liquor in certain minimum quantities (i.e. a six pack of beer, cider or RTDs);
 - there are numerous existing packaged liquor outlets in the locality including a liquor store almost immediately opposite the premises;
 - the primary focus of the proposed liquor store is the sale of pizzas, not the provision of liquor; and
 - the applicant submitted a number of survey questionnaires from members of the public in which it is indicated that the respondents would like to purchase packaged liquor when purchasing a pizza.
- 40 The proper construction of object 5(1)(c) was discussed by Bank-Smith J in ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*** [2017] WASC 88 in which it was stated that object 5(1)(c) requires regard be directed to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for consumer requirements.

⁵ *Executive Director of Public Health v Lily Creek International & Ors* [2000] WASCA 258

⁶ *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356

- 41 In assessing the applicant's evidence, and in particular the survey questionnaires, I am of the view that little weight should be afforded this material. The Liquor Commission has previously expressed some reservations about the subjective views expressed in petitions and questionnaires and the weight to be afforded such material.⁷ This has been because, among other reasons, the outcome of surveys is dependent upon the method of selection and sampling of respondents, the objectivity of the surveys and petitions, the type of questions asked, and the geographical and demographic composition and nature of the locality. In my view, the applicant's questionnaire falls within the areas of concern described by the Liquor Commission and I find that the questionnaire evidence is of little probative value. While the applicant claims the questionnaires constitute objective evidence, it is nothing more than the subjective views of some of the applicant's existing customers.
- 42 At best, the applicant's evidence indicates that some of its customers have a preference to purchase packaged liquor when they order a pizza at the applicant's premises. However, simply because some members of the public may express a view or desire that the grant of the application will provide them with added convenience in obtaining packaged liquor, this does not in itself, justify the grant of an application. In LC 21/2015, the Liquor Commission stated that:

"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."

- 43 In a similar context, the Liquor Commission has also stated⁸:

"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."

- 44 This approach is consistent with the statutory policy of regulation contained in object 5(1)(a). 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

⁷ See for example LC 6/2017

⁸ LC 18/2015

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."

- 45 The primary focus of the proposed liquor store is the provision of pizzas and the motivation for people attending the proposed liquor store is to obtain a pizza, not to obtain packaged liquor. As stated by the applicant in its PIA, the sale of packaged liquor is ancillary to its pizza business, the liquor offering is minimal and packaged liquor is easily accessible from the many existing premises in the area, all of which provide a greater choice of liquor products. The grant of the application is directed to providing customers of the applicant's pizza shop with the convenience of buying packaged liquor at the same time as their takeaway pizza. The benefits to the wider community would be very marginal.
- 46 As observed by the Liquor Commission⁹, having quoted Heenan J in **Woolworths**, "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."
- 47 The applicant tried to draw some parallels between this application and the principle of one-stop shopping which has been discussed in numerous decisions of the Supreme Court and the licensing authority by suggesting that the local community are time poor and have busy lifestyles and would appreciate the one-stop service proposed by the applicant. With respect, this analogy is misplaced, and there is no correlation between the one-stop shopping principle and this application.

⁹ LC 18/2015

Similarly, the applicant sought to draw a comparison between its proposal and other licensed premises which currently deliver liquor to their customers, however, in my view, these comparisons are of little utility and do not advance the applicant's case.

- 48 I also accept the concerns of the Commissioner and the CHO that the delivery persons are less likely to assess the age and level of intoxication of patrons due to the age of the delivery person; concerns for personal safety; and the nature of the fast-food delivery service. Therefore, it is questionable whether the applicant can properly fulfil its commitment in terms of the responsible service of alcohol and it is unclear how the applicant will ensure that liquor is only delivered to purchasers within the permitted trading hours under the licence (i.e. before 10 p.m.). For example, if an order is taken at 9.40 p.m., the delivery must be completed before 10 p.m. otherwise the delivery of liquor has taken place outside permitted trading hours. Also, I accept the submission from the CHO that the grant of the application will provide an opportunity and easy access for people who may have already been drinking to purchase more alcohol when they may not have otherwise.
- 49 Each application must be considered on its merits¹⁰, however, the onus is on the applicant to adduce sufficient evidence to discharge its burden under s 38(2). The applicant's evidence does nothing more than indicate that some of its existing customers have a preference or desire to purchase packaged liquor with their takeaway pizza. When I consider the evidence presented, I am of the view that the applicant has failed to demonstrate how the grant of the application would contribute to the proper development of the liquor industry, when considering the requirements of consumers under object 5(1)(c), as explained by Bank-Smith J¹¹, and when regard is had to object 5(1)(a).
- 50 In addition, there are other aspects of this application that would lead me to conclude that the application should be refused.
- 51 First, s 37(1)(f) of the Act provides that the licensing authority shall not grant a licence unless it is satisfied that the premises to which the application relates will be of a sufficient standard and suitable for the proper conduct of the business to be carried on there.
- 52 The applicant has indicated that a small part of the premises would not constitute the licensed premises for the purposes of the Act. It is unclear why, however, I think it is fair to conclude that this is to accommodate unaccompanied juveniles entering and remaining on the premises in order to facilitate its pizza business. If the premises are properly defined, unaccompanied juveniles would (and should) be prohibited from entering and remaining on the licensed premises.
- 53 Therefore, in my view, the proposed physical layout of the premises and the definition of the licensed premises, as submitted by the applicant, is unsuitable in terms of the venue operating as a liquor store.

¹⁰ Refer s 16

¹¹ *Australian Leisure and Hospitality Group* supra

54 I am therefore of the view that the proposed premises are not suitable or of a sufficient standard to be licensed as a liquor store under the Act as required under s 37(1)(f).

55 Secondly, this application raises the question of what type of premises and business activity would properly constitute a liquor store under the Act. This is a more vexed question.

56 The long title on the Act commences with the words “*An Act to regulate the sale, supply and consumption of liquor, the use of premises on which liquor is sold, and the services and facilities provided in conjunction with or ancillary to the sale of liquor*” This notion of regulation is reinforced in the primary objects of the Act. When s 5 is read as whole, it is clear that the regulation is for the purpose of facilitating the supply of liquor in the community but in a controlled and regulated way designed to ensure, not only that the facilities which the community requires are available, but also that the industry develops in a regulated and orderly way having regard to the interests of those participating in it.

57 The Act is also predicated on a licence classification system and sets out the authority under each licence type. Whilst there has been a blurring of the lines between the various licence classes over the years through amendments to the Act and the ability to mould a licence by conditions, in my view, the applicant’s proposed business model is not supported by the overall scheme of the Act.

58 Section 47 of the Act states:

Subject to this Act, *during permitted hours the licensee of a liquor store licence is authorised to keep open the licensed premises and to sell packaged liquor on and from the premises to any person.*

59 A liquor store licence authorises the holder of the licence to sell packaged liquor to the public, however what the applicant wants is to simply sell packaged liquor but without the responsibility of establishing a genuine liquor store *per se*. I think there is a distinction between being granted a liquor store licence under the Act as opposed to getting approval to sell packaged liquor. Simply because someone wants to sell packaged liquor to some members of the public as an ancillary service to their main business, does not automatically mean that a liquor store licence is necessarily appropriate for that purpose.

60 The nature of premises licensed under a liquor store licence was touched on by Murray J in ***Liquor Stores Association of WA (Inc) v Manya Holdings Pty Ltd*** [2000] WASCA 21 in which his honour said:

“A liquor store licence granted under s 47 is for the purpose of the supply of packaged liquor to the public generally “on and from” licensed premises which are kept open during defined hours. In my opinion it is clear that the intentions of the Act is not to use that form of licence for the supply of liquor on and from premises which are closed to the general public, to persons who are not the general public but a limited class of persons

conducting businesses which have a need for office supplies, including liquor, rather than for any private or domestic purpose.”

- 61 In **Manya Holdings**, the applicant sought the grant of a special facility licence under s 46 of the Act (as it then was) to facilitate the sale of packaged liquor with office products. It was held by the Liquor Licensing Court¹² and the Full Court on appeal, that a liquor store licence was not appropriate in the circumstances and a special facility licence under s 46 was the most suitable class of licence. However, since the decision in **Manya Holdings**, the Act has been amended to specifically restrict the granting of special facility licences, except for a prescribed purpose.
- 62 Murray J also referred to a decision from South Australia, **Liquor Stores Association Inc v Wine Net Australia Pty Ltd** [1999] SASC 238, where the nature of a liquor store licence was considered.
- 63 Although the Liquor Commission has found that it is possible to restrict the sale of packaged liquor to a certain class of persons¹³, and while not directly analogous, the decisions in **Manya Holdings** and **Wine Net** demonstrate that it is open to the licensing authority, as a specialist tribunal, to set some minimum standards in terms of what constitutes a genuine liquor store, particularly with regard to the public expectations¹⁴ and the overall scheme of the Act. In this case, the applicant only proposes to sell liquor to a limited class of person (only persons buying take-away pizzas) and the general public cannot enter the premises, browse for liquor and make a purchase, as would be the normal expectations of the public with a liquor store in this State.
- 64 The applicant’s trading activity bears little resemblance to the conventional trading operation of a liquor store licence. This scenario is distinguishable from other liquor store licences that have been granted by the licensing authority were the type of liquor that can be sold is sometimes restricted because s 64(3)(e) of the Act specifically authorises such restrictions.
- 65 In my view, a liquor store licence is not suitable in the circumstances of this case, where the applicant operates a pizza shop and wants a liquor store licence to simply facilitate certain business requirements of the franchisor. It is stated that the franchisor has instructed its franchisees in each State and Territory to make application for liquor licences to allow this service to be added to their product range. The applicant submitted that no other class of licence will suffice for the type of business it intends to operate and it has therefore sought the grant of a liquor store licence. I think this is a clear acknowledgement by the applicant that it is seeking a liquor store licence as an option of last resort in order to comply with the requirements of the franchisor.
- 66 The applicant’s proposed manner of trade is, in my view, inconsistent with the tenor of a liquor store licence under the Act and the commonly accepted expectations of the public.

¹² LLC 15/98: Manya Holdings Pty Ltd

¹³ LC 38/2017

¹⁴ Refer s 33(7) and 37(1)(f)

- 67 In exercising its discretion and in acting in the public interest the licensing authority is required to take a balanced approach to the granting of new applications and should not approach or conduct the determination on the basis of any legal or factual presumption in favour of the grant of a licence or any view that the commercial interests of an applicant are necessarily coincident with the public interest.¹⁵
- 68 The Act as a whole establishes a regime for the control and regulation of liquor outlets and a restriction of them to those applicants and places which can meet the criteria of the Act. Further, the delivery of liquor with fast-food under a liquor store licence, as envisaged in this application, would promote and provide liquor in a context not currently contemplated by the legislation. Not every circumstance in which a person may wish to sell and supply liquor is supported by the Act, and this is more so, since the Act was amended in the 1998 and 2001 to restrict the granting of special facility licences.
- 69 Section 33(1) of the Act provides the licensing authority with 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. Heenan J described the 'absolute discretion' provided for under s 33(1) in the following terms¹⁶:

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.

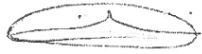
- 70 For these reasons, the application is refused in accordance with the discretion afforded the licensing authority under s 33(1).
- 71 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor

¹⁵ See *Woolworths* supra and LC 44/2010

¹⁶ *Woolworths* supra

Commission within one month after the date upon which the parties receive notice of this Decision.

72 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