

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: LIQUORLAND (AUSTRALIA) PTY LTD
PREMISES: LIQUORLAND BYFORD
PREMISES ADDRESS: 20 ABERNETHY ROAD, BYFORD
APPLICATION ID: A000201506
NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE
DATE OF DETERMINATION: 19 OCTOBER 2016

Introduction

- 1 Liquorland (Australia) Pty Ltd (the applicant) seeks the conditional grant of a liquor store licence for premises to be known as Liquorland Byford and located at 20 Abernethy Road, Byford. 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. There was one objection to the grant of the application, which was lodged by Stelor Constructions Pty Ltd, licensee of the Byford IGA Plus Liquor Store.
- 3 Pursuant to ss 13 and 16 of the Act, the application will be determined on the written material lodged by the parties. The evidence and submissions of the parties are briefly summarised as follows.

The applicant's evidence and submissions

- 4 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA provided detailed information on the nature of the business to be conducted under the licence, the social health indicators for the locality, the existing licensed premises in the area and addressed the matters set out in ss 5 and 38(4) of the Act. The PIA also included:
 - a report prepared by MGA Town Planners (MGA report);
 - an Amenity Audit Report prepared by Bodhi Alliance (Bodhi report);
 - the results of a consumer survey conducted by Data Analysis Australia (DAA report); and
 - a statement from Karl Weber, the State Manager – Operations for the Coles Liquor Group in Western Australia.

-
- 5 The proposed liquor store is to be situated in the Byford Village shopping Centre (the Centre). According to the applicant, the Centre is a new development which will provide a modern retail and food centre for residents of Byford; a facility that is currently lacking in the locality. The Centre will include food outlets, a Coles supermarket, a medical centre and other specialty retail stores, as well as a town square.
 - 6 The proposed liquor store will be a browse-only, with no drive through. The store will have a total licensed area of 209m² and carry approximately 1,500 lines of stock.
 - 7 According to the MGA report, the Byford community does not have access to a fully equipped District Activity Centre (DAC). DAC's generally have a greater focus on servicing the daily and weekly needs of residents. The Byford town centre is classed as a DAC and is the highest order centre in the locality. Retail facilities in the town have not expanded to the point where they are sufficiently comprehensive to comprise a DAC and therefore, they remain at the neighbourhood activity centre scale. The development of the new shopping centre will raise the status and function of the Byford DAC to that of a district centre, consistent with the adopted planning scheme of the local government authority. Upgrading retailing at Byford adds a new level of amenity to the area.
 - 8 It was submitted that the locality in which the premises will be located is divided by the Perth to Bunbury railway line. The South Western Highway runs parallel to the railway. Byford initially developed around a rail siding and, for the most part, the original Byford was situated on the eastern side of the rail reserve. More recently, Byford has been developing as a dormitory suburb of the Greater Perth area with most of the new development occurring west of the Perth to Bunbury railway.
 - 9 The MGA report indicates that the population for the catchment for the Byford DAC will rise from approximately 20,000 in 2011 to over 51,000 at 2031. The population of the locality itself is estimated to have increased by 189% from 2006 to 2011 and will continue to grow with the on-going development of the area.
 - 10 The locality surrounding the proposed liquor store partially or wholly includes the suburbs of Byford, Darling Downs, Bedfordale, Cardup and Karrakup. The SEIFA Index of Relative Socio-economic Advantage and Disadvantage (IRSAD) summarises information about the economic and social conditions of people and households within an area. All of the suburbs in the locality have a postcode of 6164 and this postcode ranks positively in the top 10% of all postcodes in Australia and in the top 20% of all postcodes in Western Australia. The MGA report consequently noted that *"The population within the locality featured above average measures of socio-economic advantage/disadvantage."*
 - 11 The Bodhi report considered the application from an amenity perspective. According to the Bodhi report:

-
- the Centre is accessed by main feeder roads, cycle and pedestrian paths and public transport;
 - the population of the locality is not considered at risk as it is relatively affluent (SEIFA of 8 within the State and 9 within Australia) and all other risk factors suggest the population is not at risk;
 - the latest figures available for alcohol-related hospitalisations suggest that the population of the locality is at significantly lower risk of alcohol-related ill-health (0.70 times compared to the State rate of 1);
 - negative impacts such as anti-social behaviour, noise, vandalism, litter and criminal acts impacting residential areas are considered unlikely, and would not substantially affect the current and future amenity of the area given the characteristics and context of the site;
 - although there are some identifiable sensitive use premises in the locality, there are no identified conflicts with these sensitive premises; and
 - the risk of increased exposure to alcohol for the children attending premises within the vicinity is minimised as the majority of children will not pass the proposed liquor store or have visual contact due to the setback positioning of the store within the Centre and the other uses fronting the site.
- 12 The Bodhi report also stated that the principal benefit will be for residents west of the railway line, who will not need to cross into the old town centre. The broader district community will benefit from increased shopper choice and the high amenity provided by the new shopping centre, the expanded town centre and increased local employment opportunities.
- 13 The results of the survey undertaken by DAA indicated that 56.6% of respondents supported the application, while 31% of people did not support it. Support was strongest from those who live in the West region (60%) and those who had purchased packaged liquor in the last 12 months (63%). The main reasons given for not supporting the application were that there are enough liquor stores in the area (89%) and that it will increase or cause anti-social behaviour (17%).
- 14 The applicant's PIA indicated that there are three existing packaged liquor outlets in the immediate area being the Byford Tavern, Byford IGA Plus Liquor and Aussie Liquor Discounts Liquor Store. According to the PIA:
- the Byford tavern:
 - is located about 250 metres immediately east from the applicant's store;
 - is situated to the south of Abernethy Road, while the main residential developments in Byford are situated to the north; and

-
- predominantly provides a convenience outlet for consumers purchasing liquor as part of a drive-through service.
 - the Byford IGA Plus Liquor:
 - is located about 300 metres from the proposed liquor store within a neighbourhood shopping centre, adjacent to an IGA supermarket, at the northern corner of the South Western Highway and Abernethy Road;
 - is moderately sized and trades only during supermarket trading hours; and
 - does not provide consumers with a current one-stop shopping convenience option.
 - the Aussie Discount Liquor Store is:
 - co-located with a petrol station at the corner of South Western Highway and Beenyup Road about 300 metres from the applicant's store.
- 15 In distinguishing its proposed liquor store from the existing packaged liquor outlets in the area, the applicant submitted that its store will be located at the newly-developed Centre, which is designed to be a town centre providing shopping, eating/drinking and other services to the residents of the locality. While the other packaged liquor outlets in the locality are located in a close proximity to the Centre, they are sufficiently distant to require a separate car journey for packaged liquor to be obtained in conjunction with other purchases at the Centre. Further, all of the other packaged liquor outlets are located to the east of the train line, orientated towards the older Byford town, while the applicant's premises looks to provide one-stop shopping for consumers from the newer residential developments to the west of the train line.
- 16 The applicant submitted that the benefits to the community from the grant of the application include:
- competitive pricing with over 1,500 lines of stock which will include a substantial number of Western Australian lines;
 - a revised internal layout which incorporates the latest thinking in modern store design and consumer convenience and service;
 - The provision of one-stop shopping for users of the Centre, which is particularly important given the intended function of the Centre is to operate as a town-hub, allowing for families and the broader community of Byford to shop in a newly developed Centre;
 - the provision of additional choice for residents in respect of one-stop shopping locations;

- the proposed store will complement other existing uses within the locality, including other retailers in the expanded Centre; and
- the proposed store will have comprehensive security measures in place to minimise and deter crime and anti-social behaviour.

The objector's evidence and submission

17 The objector based its objection on the following grounds under s 74(1):

- the grant of the application would not be in the public interest; and
- the grant of the application will cause undue harm or ill-health to people, or any group of people, due to the use of liquor.

18 In respect of its first ground of objection, it was submitted that there is no measurable public benefit to be derived from the granting of the licence, as the services proposed to be provided are simply a duplication of existing services. There are three existing packaged liquor outlets in close proximity which carry a similar range of packaged liquor products and therefore the applicant's proposed store will not offer any new service, nor range of packaged liquor product which is not already conveniently available in the locality. It was further submitted that whilst some respondents to the applicant's survey have indicated that the grant of the application will provide greater convenience for them, this does not take into account the many and varied considerations that require assessment before an application may be considered to be in the public interest. The objector relied upon previous decisions of the licensing authority where applications have been refused simply because the grant of application will provide increased convenience to some members of the public.

19 The objector also highlighted the fact that it has obtained approval from the licensing authority to extend the licensed area of its premises from 147m² to 425m². The new store will be almost three times larger and the liquor product range will be commensurately increased.

20 In respect of ground two of the objection, it was submitted that the impact of the proposed liquor store in terms of existing and future levels of harm is a fundamental consideration in determining whether the grant of the application is in the public interest. Increased liquor outlet density will encourage the promotion and availability of liquor within a locality and as a result the locality will have higher potential negative health and harm consequences. There are a number of sensitive venues within the locality including schools, churches and aged care facilities.

21 According to the objector, the grant of the application could put downward pressure on the price of alcohol which may further increase the risk to the community in terms of alcohol-related harm.

Statutory and legal framework

- 22 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: s 38(2). There is a positive onus on an applicant to discharge this obligation (refer *Liquorland (Australia) Pty Ltd v Executive Director of Health* [2013] WASC 51; *Seoul Mart City Pty Ltd v Commissioner of Police* (LC27/2014).
- 23 It is therefore incumbent upon an applicant to adduce sufficient information to make it possible for the licensing authority to satisfy itself that the application is in the public interest. An applicant cannot do so by expressing assertions or opinions about the public interest; any assertion or opinion must be supported by appropriate evidence (refer *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC/2015; *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014); *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010).
- 24 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).
- 25 The burden of establishing the validity of any objection lies on the objector: s 73(10), however an intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321).
- 26 The factual matters that 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).
- 27 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.
- 28 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.
- 29 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.
- 30 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.
- 31 In considering the public interest, tension may arise between the primary object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and other objects contained in s 5 of the Act. When such conflict arises, the licensing authority must undertake a weighing and balancing exercise. The decision will depend on the particular circumstances of the case (refer *Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] WASCA 258).
- 32 It is significant that the primary object in s 5(1)(b) is to ‘minimise’ harm or ill-health, not to prevent harm or ill-health absolutely. The word ‘minimise’ is consistent with the need to weigh and balance all relevant considerations (refer *Lily Creek* supra). It is a matter for the licensing authority to decide what weight to give to the competing interest interests and other relevant considerations (refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).
- 33 The harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to the health and well-being of individuals, families and communities, as well as social, cultural and economic harm. This includes harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm (refer *Re Gull Liquor, Gingers’ Roadhouse Upper Swan* (1999) 20 SR (WA) 321; *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207).
- 34 Whether harm or ill-health will, in fact, be caused to people, or any group of people, due to the use of liquor is essentially a matter of prediction. However, it is unnecessary to establish on the balance of probabilities that harm or ill-health will be caused to people, or any group of people, before the consideration can be taken into account (refer *Lily Creek* supra). The potential for harm or ill-health is to be taken into account by the licensing authority irrespective of whether the prospect is a possibility or a probability. It is a powerful public interest consideration (refer *Lily Creek* supra).
- 35 The question is whether, having regard to all the circumstances and the legislative intention, the grant of the application is justified. In answering this question, the licensing authority has a wide discretion. It is a matter for it to decide what weight to give to the competing interests and other relevant considerations (refer *Hermal* supra).

- 36 Finally, s 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.

Reasons for determination

- 37 The applicant proposes to establish a convenience style packaged liquor outlet at the Byford Village Shopping Centre. The Centre is a new development which will provide a modern retail and food complex for residents of Byford. The development of the Centre will provide an amenity which currently does not exist in the locality and provide the Byford community access to a fully equipped District Activity Centre. The population of the catchment area for the Byford DAC is expected to rise from approximately 20,000 in 2011 to over 51,000 at 2031.
- 37 The uncontroverted evidence from the applicant is that the locality surrounding the proposed liquor store is relatively advantaged in terms of its socio-economic profile (it ranks in the top 10% of postcodes in Australia and in the top 20% of postcodes in WA) and the locality does not experience high rates of alcohol-related harm. The population in the surrounding area has experienced significant growth in recent years which will continue into the foreseeable future. There is support from the local community for the grant of the application.
- 38 In *Woolworths v Director of Liquor Licensing* [2013] WASCA 227, Buss JA stated that it is a notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and

that this social fact is reflected in the development of district and regional shopping centres.

- 39 The sole objector to the grant of the application, which is an existing licensee in the area, submitted that the grant of the application would not be in the public interest and would cause undue harm or ill-health to people, or any group of people, due to the use of liquor. It was argued that there are three existing packaged liquor outlets in reasonable proximity to the applicant's proposed store and therefore the grant of the application will not offer any new service, nor range of packaged liquor product which is not already conveniently available.
- 40 I note from the evidence that the existing packaged liquor outlets are all located to the east of the Perth to Bunbury railway line and oriented around the old town centre, whilst the new Centre is located west of the railway line nearer the new residential developments in the area. Whilst I acknowledge the reasonably close proximity of the existing outlets to the applicant's proposed store, in my view, those stores cannot provide the same integrated level of service that the applicant's proposed store will offer users of the Centre, which will become the main retail hub for the area.
- 41 In respect of the objector's claim concerning the possible increase in alcohol-related harm in the community if the application is granted, I am of the view that this claim is largely speculative and not supported by the evidence. The objector relied upon various research papers about the correlation between outlet density and increased harm in the community. While such research might be relevant, it needs to be considered in the context of what is occurring in the locality to which the application relates.
- 42 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.”

- 43 Similarly, 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.”

- 44 Consequently, when the local social, demographic and geographic circumstances of this application are taken into consideration, the evidence does not support the objector’s contention that the grant of the application will cause undue harm in the local community. In assessing the risk of harm that may result from the grant of the application, it is not to be assessed in some abstract sense, but with regard to the proved circumstances of the particular area in relation to which the application is made. The evidence indicates that the locality surrounding the proposed liquor store is relatively advantaged with low rates of alcohol-related harm.
- 45 I therefore find that the objector had failed to establish its grounds of objection as required under s 73(10) of the Act. The objector clearly has a vested interest in the application being refused and it is difficult not to think that the objection is motivated by the objector wanting to maintain its existing market share; which is not a matter for consideration under the Act.
- 46 I accept the applicant’s submission that the broader community will benefit from increased shopper choice and improved amenity provided by the new shopping centre and the expanded town centre. In my view, the positive aspects of the application outweigh any potential negative impacts.
- 47 Having considered the applicant’s evidence and submissions as a whole, I find that the grant of the application will cater to the requirements of consumers for liquor and related services and will facilitate the use and development of licensed facilities reflecting the diversity of consumer requirements, consistent with objects 5(1)(c) and 5(2)(a) of the Act. There is nothing in the evidence to suggest that the grant of the application would be contrary to the harm minimisation object of the Act.

48 I am satisfied the applicant has discharged its onus under s 38(2) and the grant of the application is in the public interest and the applicant has also complied with all of the statutory requirements and conditions precedent to the application being granted. Therefore, a liquor store licence is 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 1960*, *Health Act 1911* and any written law relating to the sewerage and drainage of these premises;
- (c) all work being completed within 12 months in accordance with the plans and specifications dated 21 April 2016.
- (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements being satisfactorily completed and the Director 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;
- (f) the applicant seeking confirmation of the grant on or before **18 October 2017** pursuant to s 62(4)(c) of the Act: and
- (g) the applicant submitting evidence that it has the right to occupy the licensed premises in compliance with s 37(5) of the Act.

Conditions to be imposed on the issue of the licence

Trading hours

The permitted trading hours are those prescribed in s 98D of the Act.

Trading

The licensee is authorised to sell and supply packaged liquor in accordance with the provisions of s 47 of the Act.

CCTV

The licensee is to have and maintain a CCTV system in accordance with the policies of the Director of Liquor Licensing.

Tasting condition

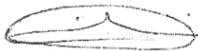
Pursuant to s 47(2) of the Act, the licensee is authorised to supply liquor, by way of free sample, for consumption within the licensed premises, subject to the following conditions:

- (a) Tastings must be conducted under the full responsibility and supervision of the licensee or approved manager at all times.
- (b) Tastings cannot be supplied to juveniles.
- (c) Glasses to be used for tastings are to be washed in accordance with the provisions of the Standards of Licensed Premises Policy of the Director of Liquor Licensing unless single use disposable containers are used.
- (d) Compliance with the Food Act 2008 at all times.
- (e) Tastings per sample must not exceed the following measures:
 - (i) Wine – 50 mls
 - (ii) Beer – 100 mls
 - (iii) Spirits – 15 mls.
- (f) Free drinking water must be made available at all times that samples of liquor are available for tasting.

Compliance With Harm Minimisation Policy

The licensee has lodged a copy of the 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.

- 49 Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
- 50 The applicant is reminded that trading **may not** commence without the prior written approval of the licensing authority.
- 51 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