

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: LIQUORLAND (AUSTRALIA) PTY LTD

PREMISES: LIQUORLAND GATEWAY

PREMISES ADDRESS: 816 BEELIAR DRIVE, SUCCESS

APPLICATION ID: A000191318

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 16 MAY 2016

Introduction

- 1 This is an application by Liquorland (Australia) Pty Ltd (the applicant) for the conditional grant of a liquor store licence for premises to be known as Liquorland Gateway and located at 816 Beeliar Drive, Success. 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 were no objections or interventions to the grant of the application.
- 3 The application will be determined on the written material lodged by the applicant as permitted under s 13 and s 16 of the Act. The applicant's evidence and submissions are briefly summarised as follows.

The applicant's evidence and submissions

- 4 The proposed liquor store is to be located adjacent to a Coles supermarket inside the Cockburn Gateway Shopping Centre (the Centre), which has recently undergone an \$80 million expansion and redevelopment. This redevelopment has resulted in an additional 41 specialist stores as well as a new Target store, food outlets and increased basement and roof deck car parking.
- 5 The proposed liquor store will be a browse-only outlet with a selling area of 177m², coolroom of 32m² and a stock area of 14m². It was submitted that the community will benefit from the grant of the application because:
 - there will be increased choice and competition for one-stop shopping at the centre;
 - the proposed store aims to offer customers competitive pricing and it is intended the store will carry approximately 1,500 lines of stock with a substantial number of Western Australian lines;

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- the store will feature a revised internal layout which incorporates the latest thinking in modern store design and consumer convenience and service;
 - the store will have displays demonstrating which kind of wine is best matched to the food consumers will be preparing;
 - the store will complement other existing and proposed uses within the locality, including the other retailers in the expanded Centre; and
 - the store will have comprehensive security measures in place to minimise and deter crime and anti-social behaviour and may have a beneficial impact of security and safety for patrons of the Centre.
- 7 According to the applicant, the operation of the premises is unlikely to have a negative impact on the amenity of the area, given the location of the proposed store within the Centre.
- 8 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA included:
- a report prepared by MGA Town Planners (the MGA report);
 - an Amenity Audit Report prepared by Bodhi Alliance (the Bodhi report); and
 - the results of consumer surveys conducted by Data Analysis Australia (the DAA report).
- 9 According to the MGA report, the Centre forms the main retail core component of the Cockburn Secondary Activity Centre (Cockburn SAC), which includes a variety of retail, personal services and office based activities extending north of the Centre to land in the Cockburn town centre, surrounding the Cockburn train station. The MGA report provided information on the demographics of the locality surrounding the proposed liquor store, the socio-economic profile of the area, at-risk groups and sub-communities in the area, traffic and access details, and the existing licensed premises in the area. In general, the population within the locality surrounding the proposed liquor store is relatively advantaged, with a Socio-Economic Index for Areas (SEIFA) decile of 9.
- 10 According to the Bodhi report, there are 35 sensitive use premises or providers within a 3 kilometre radius of the proposed liquor store, including child care facilities, schools, churches, child health centres, alcohol specific counselling services, aged care facilities and community based facilities. However, the Bodhi report concluded that all of these facilities are in closer proximity to one of the existing liquor stores in the area and did not identify any conflicts between the proposed liquor store and these sensitive premises. 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 local characteristics and context of the site.

- 11 The Bodhi report also provided information on the impact of alcohol on the local community. Rates of alcohol-related hospitalisations in the South Metro Area (within which the proposed store will be located) for the period 2007-2011 were significantly lower (0.88 times) than the corresponding State rates and the rate of alcohol-related hospitalisations in the City of Cockburn were even lower than the South Metro region (0.79 times). In terms of alcohol-related crime, Cockburn recorded a 15.5% decline in offences in 2009/10 compared to the previous 12 months with overall rates of crime similar to the South West Metro and the State in most selected offences. In 2009-2010, alcohol was a factor in 34.9% of assaults recorded in Cockburn, a proportion notably lower than the South West SD (38.1%) and Western Australia (45.2%), however, domestic assaults accounted for 44% of total reported assaults in the City, a proportion higher than the SSD (34.3%) and the State (38.5%).
- 12 Data Analysis Australia conducted two surveys to gauge public response to the grant of the application: a telephone survey of residents within a 3km radius of the proposed liquor store; and an intercept survey of shoppers visiting the Cockburn Gateway Shopping Centre. Some of the findings from the DAA report include:
 - more respondents used the Woolworths supermarket in the Centre than the Coles supermarket;
 - the intercept survey encountered a wide range of supermarkets, suggesting that a significant proportion of users of the shopping centre did most of their supermarket shopping elsewhere, particularly those who live further away;
 - the telephone survey showed that First Choice Liquor Superstore Jandakot was the most popular store followed by BWS in the Centre. In the intercept survey, with its weighting towards more frequent users of the Centre, the order was reversed, with the BWS store being more popular than the First Choice store. The Cellarbrations liquor store associated with the Gate Bar and Bistro is used by only 3% in the telephone survey and 7% in the intercept survey;
 - 57% of respondents to the telephone survey and 62% of the respondents to the intercept survey indicated they support the application. When only respondents who purchase takeaway liquor are considered, these percentages rise to 66% for the telephone survey and 70% for the intercept survey; and
 - 29% of respondents for the telephone survey and 21% for the intercept survey indicated that they would use the proposed liquor store at least monthly, rising to 36% and 29% respectively if only purchasers of takeaway liquor are considered.
- 13 In summary, the applicant submitted that the main benefit for the community from the grant of the application will be the increased choice and competition for one-stop shopping in the Centre. In this regard, the applicant submitted that the redeveloped

Centre is large enough to sustain multiple one-stop shopping services, similar to the services provided by BWS and Liquorland stores at the Lakeside Joondalup shopping centre.

Determination

- 14 The applicant seeks to establish a convenience style liquor store in the Gateway Shopping Centre adjacent to a Coles supermarket. Within the Centre, there is an existing BWS liquor store, which is approximately 200 metres from the applicant's proposed premises. The Gate Tavern, which has a Cellarbrations drive-through packaged liquor facility, is about 100 metres from the applicant's proposed store. There are a further four packaged liquor outlets, including a First Choice destination outlet, within the locality.
- 15 According to the MGA report, the BWS Gateway store performs a similar function to the proposed Liquorland store, with a similar range and breadth of stock, including a range of popular wine, beer and spirits. The MGA report also stated that although the sale of packaged liquor is not the primary focus of the Gate Tavern, its Cellarbrations drive-through component caters for both patrons who use the drive-through facility or those who wish to browse for packaged liquor.
- 16 There were no objections or interventions to the grant of the application. However, the application does not proceed on the presumption that the application should be approved. Rather the opposite applies where the onus falls upon the applicant to satisfy the licensing authority that the grant of the application is in the public interest (refer s 38(2) of the Act). The private commercial interests of the applicant do not necessarily coincide with the public interest.
- 17 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).
- 18 The factual matters which I am bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5 (refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227).
- 19 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

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- 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.
- 20 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.
- 21 Each application must be considered on its merits however, the 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 (refer s 33(1)).
- 22 It was submitted by the applicant that the main benefit to the community from the grant of the application will be increased choice and competition for one-stop shopping in the Centre.
- 23 Buss JA in *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 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.
- 24 In this regard, the Court of Appeal (Malcolm CJ, Rowland J and Anderson JJ) in *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors*, unreported, FCT SCt of WA; Library No 940553; 7 October 1994, upheld a decision of the Liquor Licensing Court to refuse an application for a liquor store licence in a shopping centre even though there was no other liquor store under the main roof of that shopping centre. In that case, there was an existing tavern near the supermarket, albeit separated by a parking area which served them both. It was submitted by the applicant in that case that a desire for one-stop shopping was now accepted as being objectively reasonable and therefore, every supermarket should have a liquor store. However, the Court of Appeal held that the Liquor Licensing Court Judge had not erred in finding as a fact that, in view of the presence of the existing outlet so close to the supermarket as to almost be part of the shopping centre, any subjective requirement of the relevant section of the public for a liquor store to be located within the supermarket was not objectively reasonable. It was held that although the tavern was not under the main roof of the shopping centre complex, it was properly regarded as being sufficiently adjacent to service the requirement of “one-stop shopping”.

- 25 The applicant submitted that the redeveloped Centre is large enough to sustain multiple one-stop shopping services and in acknowledging the decision of the Court of Appeal in *Woolworths*, the applicant was of the view that the service provided by the external outlet must be capable of sustaining consumer demand for one-stop shopping and in the present case, the Cellarbrations drive-through at the Gate Tavern is not capable of sustaining this demand, particularly in view of the survey data which indicates only 7.5% of respondents use the drive-through as their preferred outlet and the drive-through is far enough from the existing grocery store in the Centre to negate any convenience it could enjoy as a one-stop shopping destination.
- 26 In respect of the existing BWS Gateway store, the applicant submitted that consumer requirements demand a level of choice and competition that presently does not exist in the Centre and which would be provided by the grant of this application.
- 27 Catering to the requirements of consumers for liquor and related services under object 5(1)(c) must be considered in the context of the proper development of the liquor industry. Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, said:

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

Because the appellant has emphasised the potential significance of the primary objects of the Act set out in s 5(1)(c), it is necessary to observe that another primary object specified by s 5(1)(a) is to regulate the sale, supply and consumption of liquor and that this statutory policy of regulation is entirely consistent with the measured approach to what may be regarded as contributing to the proper development of the liquor industry and to the facilitation of the use and development of licensed premises to reflect the diversity of requirements in this State. These considerations are inextricably linked with the public interest and cannot be properly addressed or applied without regard to it.”

- 28 The Liquor Commission has also made it clear, in a number of decisions, that establishing a liquor outlet beside every supermarket is not in accordance with the provisions and intent of the Act. For example, in LC 18/2015 the Liquor Commission stated:

“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.

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Proper development of the liquor industry is not synonymous with the unrestricted expansion of liquor outlets to satisfy a desire on the part of some consumers of liquor or liquor related services for a relatively insignificant or inconsequential modification or improvement to the level of convenience. The long term interests of (the) (sic) liquor industry are best served by a controlled development of the industry having regard to public perceptions of the industry and the overall health and well being of the community.”

29 Further, the Liquor Commission in LC 21/2015 stated:

“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.”

30 The views expressed by the Liquor Commission in the above decisions are also consistent with the Second Reading Speech which accompanied the introduction of the *Liquor and Gaming Legislation Amendment Act 2006* (see *Parliamentary Debates, WA Parliament, vol 409, p 6342*) when the then Minister for Racing and Gaming stated:

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

31 I acknowledge that the applicant’s evidence indicates that the population of the locality does not appear to be over burdened with alcohol-related harm and is relatively advantaged in socio-economic terms. Nonetheless, I am of the view that the grant of

this application is more about the commercial interests of the applicant rather than the public interest. Although the survey data indicates some support for the proposed liquor store, the question arises as to whether the subjective views of the respondents are objectively reasonable in the context of the regularity framework of the Act and the measured approach to what may be regarded as contributing to the proper development of the liquor industry.

- 32 In terms of the surveys, I note that 64.1% of respondents to the telephone survey indicate that they would use the applicant's proposed liquor store a few times a year or less and this rises to 81.7% who would use the proposed liquor store once a month or less. From the intercept survey, 71.1% of respondents would use the premises a few times a year or less and 88.2% would possibly use the premises at most once a month or less. I also note that the Woolworths supermarket is preferred by more respondents than the Coles supermarket. The DAA report stated that for many respondents, their support for the application was based upon equity – if Woolworths can have a liquor outlet, then so should Coles.
- 33 The applicant's own evidence indicates that what it proposes is merely duplicating the existing services provided by the BWS Gateway store, which according to the MGA report is conveniently accessible by patrons of the Centre. Also, I do not accept the applicant's contention that the packaged liquor service at the Gate Tavern should be disregarded because it is not the first place of choice for many respondents to the surveys or because it is too far from the Coles supermarket. It is 100 metres away and is sufficiently adjacent to the Centre to be regarded as being part of the Centre. It is also important to note that the concept of one-stop shopping is not just about being able to attend a Coles supermarket and then purchase liquor at a Coles related liquor store. It is a broader concept where the public can undertake all of their shopping needs at the one location, not just grocery shopping. Hence the reference by Buss JA to the development of regional and district shopping centres. Anderson J in the Court of Appeal decision alluded to the distinction between one-trolley shopping and one-stop shopping. As the Liquor Commission has stated, it is not about having a liquor outlet beside every supermarket.
- 34 Notwithstanding the view of the Court of Appeal that one packaged liquor outlet in a shopping centre is capable of satisfying the one-stop shopping requirements of the public, the applicant's case is also further diminished because, in my view, choice and competition for one-stop shopping currently exists at the Centre due to the presence of BWS Gateway and the Gate Tavern and a large percentage of respondents to the surveys indicate that they would only use the applicant's premises on an infrequent basis.
- 35 No doubt, as evidenced by the survey data, there are some people who may find it convenient to shop at the Coles supermarket and then purchase packaged liquor from the applicant's proposed liquor store, however catering to mere convenience for some members of the public to access packaged liquor does not in and of itself justify the

grant of a licence, particularly when there are existing outlets in close proximity. I am satisfied that the public attending the Centre can avail themselves of the convenience of one-stop shopping by using one of the existing packaged liquor outlets there. As already mentioned, there are also four other packaged liquor outlets in the locality, including a large destination outlet, which the applicant's survey data indicates is quite popular with people who live in the locality.

- 36 I am of the view that the proper development of the liquor industry is not synonymous with having a packaged liquor outlet attached to every supermarket and this view is supported by the decision of the Court of Appeal in *Woolworths* and the various decisions of the Liquor Commission, some of which I have referred to above. It is also consistent with the measured approach to be adopted under object 5(1)(a) of the Act.
- 37 I therefore conclude that the grant of the application would not be in the public interest and is rather directed to advancing the commercial interests of the applicant. The proper development of the liquor industry would not be served by the grant of this application and therefore in accordance with the discretion afforded the licensing authority under s 33(1) of the Act, the application is refused.
- 38 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.
- 39 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