

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

- Applicants:** Whilan Holdings Pty Ltd
Vasse Holdings Pty Ltd
Queens Street Tavern Pty Ltd
Oakline Pty Ltd
(represented by Mr David Markovich and Mr Jarrod Ryan of Murfett Legal)
- Intervener:** Commissioner of Police
(represented by Mr Jesse Winton of State Solicitor's Office)
- Respondents:** Progressive Pty Ltd
(represented by Mr Phil Cockman of Canford Hospitality Consultants Pty Ltd) ("the first application")
- Woolworths Limited
(represented by Mr Henry Jackson instructed by Ms Catriona Macleod and Ms Susan Nicholson of Cullen Babbington Macleod Lawyers) ("the second application")
- Commission:** Mr Seamus Rafferty (Deputy Chairperson)
Mr Eddie Watling (Member)
Ms Helen Cogan (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to conditionally grant liquor store licences to Progressive Pty Ltd and Woolworths Ltd in Busselton
- Premises:** Progressive Supa IGA Busselton
30 Kent Street, Busselton
- Woolworths Supermarket Busselton
65 Kent Street, Busselton

Date of Hearing: 8 August 2013

Date of Determination: 21 January 2014

Determination Decisions of the delegate of the Director of Liquor Licensing are affirmed.

Authorities referred to in Determination:

- *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Kioa v West* [1985] 159 CLR 550
- *Michael Wilson & Partners v Nicholls* [2011] HCA 48
- *Whilan Holdings Pty Ltd v Progressive Trading Pty Ltd* [2013] WASC 354
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

BACKGROUND

The first application

- 1 On 9 December 2011, Progressive Trading Pty Ltd (“the first applicant”) lodged an application for the conditional grant of a liquor store licence for premises to be known as Progressive Supa IGA Busselton located at the Busselton Central Shopping Centre, 30 Kent Street Busselton.
- 2 On 22 February 2012, objections to the first application were lodged by Talbot Olivier Lawyers on behalf of:
 - Whilan Holdings Pty Ltd;
 - Vasse Holdings Pty Ltd;
 - Queen Street Tavern Pty Ltd;
 - Oakline Pty Ltd.
- 3 On 22 February 2012, the Executive Director of Public Health lodged a Notice of Intervention.

The second application

- 4 On 22 February 2012, Woolworths Ltd (“the second applicant”) lodged an application for the conditional grant of a liquor store licence for premises to be known as Woolworths Supermarket Busselton located at 65 Kent Street, Busselton.
- 5 On 9 April 2012 objections to the second application were lodged by Talbot Olivier Lawyers on behalf of;
 - Whilan Holdings Pty Ltd;
 - Vasse Holdings Pty Ltd;
 - Queens Street Tavern Pty Ltd;
 - Oakline Pty Ltd.
- 6 On 7 August 2012, the Commissioner of Police lodged a Notice of Intervention.
- 7 The Delegate of the Director of Liquor Licensing (“the Director”) decided on the basis that the first and second applications were for premises in reasonable proximity to each other to hear the applications together and that therefore pursuant to section 16(12) of the *Liquor Control Act 1988* (“the Act”), the evidence relating to one application was evidence relating to the other.

- 8 The delegate also decided that pursuant to sections 13 and 16 of the Act the applications would be determined on the papers.

Decision of the Delegate of the Director of Liquor Licensing

- 9 On 15 March 2013, the delegate of the Director granted the applications. (Decision A221876)
- 10 On 16 April 2013, Talbot Olivier Lawyers on behalf of the objectors to both applications lodged an application with the Liquor Commission for a review of the decision of the Delegate of the Director pursuant to section 25 of the Act.
- 11 On 8 August 2013, a hearing of the matter was conducted before the Commission. A number of preliminary issues were raised as a result of which the following programming orders were made with the consent of the parties to the proceeding:
- a) In respect to the ground of procedural fairness raised by the objectors, the Commissioner of Police, Woolworths Ltd and Progressive Trading Pty Ltd were required to file and serve their submissions by close of business, Friday, 16 August 2013;
 - b) The objectors were required to file and serve responsive submissions by close of business Friday, 30 August 2013;
 - c) In respect to the lodgement of submissions to support the review application, the applicant was required to file and serve submissions by close of business Friday, 16 August 2013;
 - d) The Commissioner of Police, Woolworths Ltd and Progressive Trading Pty Ltd were required to file and serve responsive submissions by close of business Friday, 30 August 2013.

PROGRESSIVE TRADING PTY LTD APPLICATION

Initial submissions on behalf of the first applicant

- 12 The first applicant seeks a liquor store licence for premises located at the Busselton Shopping Centre, 30 Kent Street, Busselton WA.
- 13 The first applicant lodged a Public Interest Assessment ("PIA") with supporting documentation and complied with all formalities in connection with its application.

- 14 The first applicant's detailed submissions and documentation before the Delegate of the Director were examined by the Commission and a fair summary of those submissions and documentation was contained in the written reasons of the delegate of the Director which is set out below as follows:

The applicant seeks to establish a small scale liquor store set within the IGA retail area of the Busselton Central Shopping Centre. The proposed liquor store will consist of approximately 120sqm of patron walk through display area and an adjoining cool room. The Busselton Central Shopping Centre is a single level, air-conditioned neighbourhood shopping centre bounded by Prince, West, Kent, and Duchess Streets and is considered the dominant retail complex in the Busselton region. The centre provides 362 open car parking bays and incorporates over 15 specialty stores, including the IGA supermarket, Best and Less and Red Dot. There are over 1.5 million customer visits to the shopping centre annually.

The applicant proposes to provide one stop shopping convenience to the public who use the shopping centre. According to the applicant, patrons of the shopping centre, who have completed their grocery shopping and wish to purchase liquor, must walk back to their cars and drive to another destination, where they may have to park their car and walk into licensed premises. This is inconvenient, particularly for people with mobility issues, the elderly, mothers with infants or time poor executives. To support this contention, the applicant initially submitted a petition with 257 signatures and 27 witness questionnaires. Later, a further petition with 168 signatures, 22 questionnaires and 8 statements were submitted. The applicant summarised this evidence as follows:

- there are many retirees amongst the witnesses who have stated that they would find the proposed one stop shopping service very convenient;*
- witnesses thought that this one stop shopping opportunity will allow shoppers to enjoy savings in time, money and petrol;*
- the witnesses generally felt that the proposed location for this liquor store was very convenient, being a large modern shopping centre;*
- the witnesses felt that the proposed liquor store will have a positive impact on the amenity of the locality, bringing more competition and choice for liquor products; and*
- many witnesses describe the management and staff of the applicant company as capable, professional and experienced retailers, who would be more than able to deliver an excellent liquor store for the benefit of the local community.*

The applicant's Public Interest Assessment (PIA), lodged in support of the application, provided information on the proposed manner of trade, the style and layout of the premises,

the demographics and socio-economic profile of the locality and the matters contained in section 38(4) of the Act. It was submitted that the Australian Bureau of Statistics indicate that the Shire of Busselton had a permanent resident population of 25,950 in 2004 with the town of Busselton accounting for 67% or 17,400 of the total. The permanent population of the Busselton Local Government Area increased 19.6% between 2006 and 2011, which was significantly greater than the state rate (14.3%). The population for the area is expected to grow to 46,000 in 2021.

In summary, it was submitted that this is an application for a small scale liquor store in a substantial, quality supermarket contained within a large and popular shopping centre in the fast growing town of Busselton. The potential public benefits to shoppers who use the centre and the supermarket outweigh any potential negative impact that the grant of the application may have on the community.

Submissions on behalf of the Executive Director of Public Health

- 15 The detailed submissions on behalf of the Executive Director Public Health were summarised by the delegate of the Director as follows:

The Executive Director Public Health (EDPH) lodged a Notice of Intervention in respect of the IGA application for the purpose of making representations regarding trading conditions that are likely to minimise alcohol-related harm by ensuring that the sale of packaged liquor within the existing regional community supermarket is separated from general grocery items.

The EDPH was of the view that because the proposed licensed premises will be located within the grocery area of the IGA supermarket, there is an increased risk of exposure of children and young people to alcohol, positioning it as an ordinary commodity. Consequently, the EDPH recommended that the following conditions be imposed on the operation of the licence if the application is approved:

- the licensed area must be enclosed by barricading.*
- the proposed barricading must be over 2 metres in height.*
- there must be a dedicated point of sale within the licensed area.*
- the entry to the licensed premises must have a gate.*
- the area must be closed off when not open for trade.*
- customers must not be able to see through the shelving into the licensed area.*

WOOLWORTHS LTD APPLICATION

Initial submissions on behalf of the second applicant (Woolworths Ltd)

- 16 The second applicant seeks a liquor store licence for premises to be known as Woolworths Supermarket Busselton located at 65 Kent Street, Busselton.
- 17 The second applicant's detailed submissions and documentation before the Delegate of the Director were examined by the Commission and a fair summary was contained in the written reasons of the Director delegate which is set out below as follows:

A large, new Woolworths supermarket is being established as part of a new retail development constructed on land between Kent and Duchess Streets in Busselton. It is submitted that the supermarket, totalling over 4,761 m², will be one of the largest and modern Woolworths supermarkets in Australia. The supermarket will incorporate 10 distinct departments, one of which is proposed to be a liquor store which will be located in the south eastern corner of the supermarket. The proposed liquor store will be approximately 206m² and include a walk-in cool room, aisles of shelving and a service desk and will be designed to permit easy access by supermarket trolleys to provide for customer convenience so that they can combine supermarket shopping with the purchase of packaged liquor.

This new supermarket will update and replace the existing Woolworths supermarket in Busselton and it will be considerably larger than the existing supermarket and provide a range of new services. Currently, over half a million people patronise the existing supermarket and modelling undertaken by the applicant indicates that the new supermarket will attract a greater number of patrons (approximately 600,000). The new development is very central to the Busselton Central Business District and will provide a public link between Kent Street and Duchess Street.

The applicant's Public Interest Assessment (PIA) lodged in support of the application provided information on the nature of the locality in which the premises is to be located, the demographics and social health profile of the area, and information on the existing packaged liquor outlets. Briefly, it is submitted that Busselton is a popular and growing area whose CBD regional catchment area expanded rapidly (17.5%) between 2006 and 2011. Each year, approximately 700,000 people visit the area.

To evidence that the grant of the application would promote object 5(1)(c) of the Act (catering to the requirements of consumers for liquor and related services), the applicant submitted an independent market survey of existing Woolworths' customers where nearly 60% of respondents indicated that they would be likely to use the proposed liquor store and

80% of those likely to visit the liquor store would do so as part of a visit to the Woolworths supermarket.

It is submitted that the grant of the application will primarily cater to the packaged liquor requirements of the customers of the new Woolworths Supermarket Busselton. The proposed liquor store will provide a diverse and quality product range comprising of approximately 1,886 product lines and will be operated by the applicant who has an established a sound track record in the responsible service of liquor.

Submissions on behalf of the Commissioner of Police

- 18 The detailed submissions of the Commissioner of Police were outlined by the delegate of the Director as follows:

The Commissioner of Police lodged a Notice of Intervention in respect of the Woolworths application to express concerns that the existing level of alcohol-related harm in Busselton may increase if another packaged liquor outlet is established in the area.

According to the Commissioner of Police, there were 992 reported crimes in Busselton between January 2011 and July 2012, of which 63 were alcohol related. In view of the existing number of liquor outlets in Busselton, the grant of a further liquor store licence may increase the consumption of alcohol in the area and result in an increase in alcohol-related harm. If the application is approved, the Commissioner of Police recommends that appropriate conditions be imposed on the operation of the licence.

Submissions by objectors to both applications (applicants in the application for review before the Commission)

- 19 The very detailed submissions and documentation lodged were examined by the Commission and a fair summary on behalf of the objectors is contained in the written reasons of the delegate which is set out below as follows:

Pursuant to section 74 of the Act, the grounds of objection are that the grant of the application;

- would not be in the public interest;*
- would cause undue harm or ill-health to people, or any group of people, due to the use of liquor;*
- would cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school;*

- *would impact on the amenity, quiet or good order of the locality in which the premises are situated; and*
- *would be contrary to the Act.*

It was submitted by the objectors that the current licensed premises in Busselton sufficiently cater for the requirements of consumers for liquor and it would not be in the public interest to have the locality saturated with packaged liquor outlets. Within the Busselton CBD there are 5 licensed premises permitted to sell packaged liquor, consisting of three drive-thru liquor outlets (Albies, Thirsty Camel, and the Royal Palms Resort) and two liquor stores (Liquor Barons and Cellarbrations). When you compare the population per packaged liquor facilities for the “suburb” of Busselton with the “suburb” of similar towns such as Bunbury, Geraldton, Albany and Esperance, Busselton has the second lowest population per packaged liquor facilities.

According to the objectors, research indicates that there is a relationship between an increase in liquor outlet density, alcohol sales and alcohol-related harm in the community.

Both the Woolworths and IGA applications are focused on the convenience supposedly associated with one-stop or one trolley shopping, however it is submitted that:

- *one-stop or one-trolley shopping is already available in the locality;*
- *the proposed applications do not provide for one-transaction shopping;*
- *the existing outlets meet the requirements of consumers for liquor;*
- *the convenience of one-stop shopping is not enough to meet the public interest requirements of the Act; and*
- *not everyone wants to buy their liquor at the same time as doing their grocery shopping.*

The objectors submitted two petitions with 586 and 281 signatures respectively, stating that the current liquor facilities in Busselton are satisfactory. Questionnaires from 24 respondents were also submitted in which the respondents indicate that the existing packaged liquor facilities adequately cater for their requirements for liquor and are conveniently located. The questionnaire respondents also expressed views on the potential impact that another two liquor stores would have on underage drinking in Busselton and the potential negative impact on at-risk groups in the area.

According to the objectors, the presence of liquor as part of a local grocery and general store will result in greater visibility of liquor to minors and other “at-risk” groups and may also promote impulse purchasing of liquor resulting in increased alcohol consumption.

It was submitted by the Objectors that the grant of either the IGA or Woolworths application would not be in the public interest and would not be consistent with the objects of the Act. Increasing the outlet density of packaged liquor facilities in a small community such as Busselton will increase the harm or ill-health caused to people, or any group of people due to the use of liquor. The existing licensed premises in Busselton sufficiently cater to the requirements of consumers for liquor in the area and it would not be in the public interest to have the Busselton locality saturated with licensed premises selling packaged liquor to the general public.

GROUNDINGS FOR REVIEW OF DECISION A221876

20 On 22 April 2013, the objectors lodged their grounds for review of Decision A221876. The grounds were particularised under the following headings:

- a) Denial of procedural fairness
- b) The Objectors
- c) Lack of objective evidence
- d) Anti-needs test
- e) Growth in Busselton
- f) Convenience
- g) Outlet density
- h) Harm and ill-health
- i) Intervention by the Executive Director of Public Health
- j) Woolworths supermarkets
- k) Conclusion

PRELIMINARY ISSUES AT THE HEARING ON 8 AUGUST 2013

21 There were a number of preliminary issues to be determined by the Commission in this matter, they being:

- a) an application to adjourn the substantive hearing listed on 8 August 2013;
- b) an application for each of the Commissioners to recuse themselves on the basis of an apprehension of bias;
- c) A submission that the applicants had been denied procedural fairness during the course of the proceedings before the Director at first instance and that the matter be remitted to the Director for further consideration.

22 The first two applications were determined at the hearing on 8 August 2013. Both applications were refused. The basis for these decisions is set out in the following paragraphs.

Application to adjourn the hearing

- 23 At the hearing on 8 August 2013 counsel for the applicants made an application to adjourn the proceedings. The application to adjourn the hearing was opposed by both respondents.
- 24 There were various reasons advanced in support of the application, they being:
- a) the solicitor with the conduct of this matter, Mr Jarrod Ryan changed firms;
 - b) he did not receive the file relating to this matter from his previous employer until 26 July 2013;
 - c) he did not receive the whole file;
 - d) he received documents from Woolworths on 26 July 2013;
 - e) he was briefing counsel from South Australia who, 'unfortunately, wasn't able to be here today because of another matter that got brought on.'¹
- 25 During the course of the hearing, when called upon to make submissions in respect of the section 25 application, Mr Markovich stated, 'We're unable to do so.'² When asked as to why this was the position, the Commission was advised that, 'because the counsel of choice and who had been instructed on these matters is unable to attend.'³ The position in this regard became clearer later in the hearing:

MR RAFFERTY: Why is he [Mr Firth] unavailable?

MR MARKOVICH: He said having received the documents on Friday the 2nd and he apparently was ill over the weekend and having turned his mind to the matter on Monday, 5 August, when he then met with Mr Ryan and he reviewed the documents and then on Tuesday, I take it, then informed Mr Ryan that he was – that counsel was unable to adequately deal with all of the additional ---

MR RAFFERTY: So it's not a question of unavailability? It's a question of a conscious decision not to appear. Am I correct?

MR MARKOVICH: Well, it was – as I understand it, he was ---

MR RAFFERTY: Mr Ryan, you can talk. You have been speaking to him. You don't need to talk through ---

MR RYAN: Yes

¹ Hearing 8 August 2013, transcript page 17.

² Hearing 8 August 2013, transcript page 61.

³ Supra.

MR RAFFERTY: As I said, please don't feel any issue butting in on each other if you know more, Mr Ryan.

MR RYAN: Yes. I met with Mr Firth in Adelaide on both Monday and Tuesday and on Tuesday he's had the chance to have a look at the documents and he said, "There's absolutely no way getting all the documents at such late notice that I can be ready to go on this come Thursday the 8th." He said, "Also in addition to that, I do have another brief," a matter that he's been dealing with involving the Palace Nightclub in Hindley Street that – involving a police matter that got brought on at the last minute, but that was meant to be originally set for later in the month on the 20th, 21st, which is why he couldn't come over here. I think that got brought on urgently this morning by the police to deal with ---

MR RAFFERTY: So it was brought on urgently this morning, but he had already ---

MR RYAN: It was coming on urgently this morning.

MR RAFFERTY: When was that? When was the decision made for that to come on?

MR RYAN: I don't know when the decision was made for it, but he knew of that on Tuesday.

MR RAFFERTY: He was definitely briefed on this matter first?

MR RYAN: Yes.⁴

- 26 The solicitors for the applicant received the relevant documents from Woolworths on 26 July 2013. Putting aside the fact that these documents had been inspected by Mr Ryan prior to the original decision of the Director, no explanation was given as to why it took a week to get the documents to Mr Firth in Adelaide.
- 27 Of greater concern is the fact that Mr Firth had been briefed to appear at the Commission prior to the matter that was urgently listed in Adelaide. A conscious decision appears to have been made not to appear before the Commission on the basis that:
- a) Mr Firth did not consider that he had sufficient time to prepare the matter for hearing; and/or
 - b) Mr Firth had another matter listed that he considered took precedence over these proceedings.
- 28 Whatever the case may be, the manner in which this matter has been conducted by the solicitors for the objectors and counsel engaged to appear has fallen short of an acceptable

⁴ Hearing 8 August 2013, transcript pages 69-70.

standard. The Commission was left in a position in which we were told that the matter could not proceed effectively because counsel briefed on the matter had decided not to attend.

- 29 In the case of IGA, it had been approximately 20 months since the filing of the application for a liquor licence. Whilst it is important that the objectors be able to advance their position, it is equally important to consider the interests of all parties. The position in which the objectors found themselves was entirely attributable to the manner in which those who represent their interests conducted this matter. As such, when balancing all relevant considerations, the Commission determined that the application for an adjournment should be refused.
- 30 So as to ensure that the objectors themselves were not prejudiced by the conduct of their legal representatives, the Commission made orders allowing for the filing of further written submissions subsequent to the hearing. These were received in accordance with the programming orders made by the Commission and were considered in determining the section 25 review application.

Application to Recuse on the Basis of an Apprehension of Bias

- 31 At the commencement of proceedings on 8 August 2013, counsel for the objectors made an application that the three presiding Commissioners recuse themselves on the basis of an apprehension of bias.
- 32 The Deputy Chairman advised the parties that he had made all relevant decisions prior to the hearing of his own volition and that Commissioners Cogan and Watling had no part in that decision making process. When questioned as to whether the application related solely to the Deputy Chairman or all three Commissioners, counsel for the applicant advised that the application related to all three Commissioners.
- 33 The High Court has outlined in a number of decisions the test to be applied in determining whether a decision maker should be disqualified by reason of the apprehension of bias. The test is whether a fair minded lay observer might reasonably apprehend that the decision maker might not bring an impartial and unprejudiced mind to the resolution of the question that is required to be determined.⁵
- 34 The test is objective and has its foundation in the need for public confidence in the judiciary [and other decision makers].

⁵ *Michael Wilson & Partners v Nicholls* [2011] HCA 48 per Gummow ACJ, Hayne, Crennan and Bell JJ at 31.

- 35 The application of the apprehension of bias principle requires two steps, they being:
- a) The identification of what it is said might lead the decision maker to decide a case other than on its legal and factual merits;
 - b) An articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.⁶
- 36 The applicant's argument was that because they were appealing the manner in which the Commission had dealt with the section 25 application and procedural fairness issues prior to the hearing on 8 August 2013, that this gave rise to an apprehension of bias against the applicants and this was a proper basis for each Commissioner to recuse themselves. Counsel for the applicant, Mr Markovich submitted that the application was 'specifically in relation to the appeal procedures. There is effectively criticism, and not personal, but criticism being placed as to the conduct of these hearings...'⁷
- 37 Applying the first step referred to in *Ebner's* case, the background to the proceedings is significant. The objectors made an application pursuant to section 25 of the *Act* on 16 April 2013. They subsequently sought a preliminary hearing to ventilate the procedural fairness issue. The Commission acceded to this request and advised the parties of the date of the hearing. That date was not suitable to counsel for the objectors. Given the need to deal with all matters relating to the matter as expeditiously as possible, the Deputy Chairman made a decision to list the matter for a substantive hearing on 8 August 2013 on which date the procedural fairness issue and section 25 application would be considered.
- 38 The objectors appealed the decision to list the matter for hearing to the Supreme Court. An application to stay the proceedings of 8 August 2013 was heard by Her Honour Pritchard J on 7 August 2013. The application to stay the proceedings was dismissed, however the actual appeal itself remained on foot.⁸
- 39 In essence, it was asserted that because the Commission (constituted by the Deputy Chairman) made a decision to list the matter for hearing and to hear the procedural fairness issue and section 25 application simultaneously, and that this decision was the subject of an appeal to the Supreme Court, that the Commission might not decide the case on its legal and factual merits.
- 40 Other than listing the matter for hearing, the Commission has made no other relevant rulings in respect to these proceedings prior to the hearing on 8 August 2013. The fact that

⁶ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at 345.

⁷ Hearing 8 August 2013, transcript page 3.

⁸ *Whilan Holdings Pty Ltd v Progressive Trading Pty Ltd* [2013] WASC 354

the decision to list the matter has been the subject of an appeal to the Supreme Court was the only basis upon which it was submitted that there could be an apprehension of bias against the applicants. Applying the objective test it is impossible to see how the hypothetical reasonable observer could possibly conclude that the decision makers in this matter might not bring an impartial and unprejudiced mind to the resolution of the proceedings.

41 The application for the Commissioners to recuse themselves is therefore dismissed.

Assertion of Denial of Procedural Fairness

42 The objectors submit that they were denied procedural fairness during the course of proceedings before the Director. This submission is based on two factors, namely:

- a) the conduct of Woolworths in refusing to provide documents when requested;
- b) the procedures adopted by the Director.

43 At the hearing, counsel for the objectors conceded that the real issue was that of “adequacy” in that the applicants had not had an adequate opportunity to deal with evidence adduced by Woolworths in support of its application.

44 The doctrine of natural justice has been traditionally expressed in the following terms: “when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.”⁹.

45 This doctrine applies in the making of administrative decisions “which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.”¹⁰

46 There is no dispute that the Director is bound by the requirements of procedural fairness, having regard to the decision of the Full Court in *Hermal Pty Ltd v Director of Liquor Licensing*¹¹ and the wording of section 16(11) of the *Act*.

47 Section 16(11) of the *Act* prescribes that the licensing authority, “shall ensure that each party to a proceeding before it is given a reasonable opportunity to present its case and, in particular, to inspect any documents to which the licensing authorities proposes to have

⁹ *Kioa v West* [1985] 159 CLR 550 per Mason J at 582

¹⁰ *Supra*, at 584

¹¹ [2001] WASCA 356

regard in making a determination in the proceedings and to make submissions in relation to those documents.”

- 48 There is no dispute that the objectors were given the opportunity to inspect the documents provided by Woolworths in support of their application. The solicitor for the objectors, Mr Jarrod Ryan submitted at the hearing on 8 August 2013 that he had seen all of the materials that were before the Director in making his decision.¹²
- 49 It is clear from the materials before the Commission that the Director provided the solicitors for the objectors a number of opportunities to inspect the documents relied upon by Woolworths and did so. The objectors were aware of the basis for the application made by Woolworths and were given a sufficient opportunity to respond to matters that were before the Director. Accordingly, it cannot be concluded that the objectors were denied procedural fairness and the Commission declines to remit the matter to the Director for further consideration.

SECTION 25 REVIEW

Legal Principles Governing Review

- 50 The Commission is not constrained by the need to find error at first instance but is to undertake a full review of the materials before the Director by way of a rehearing. The Commission is to make its own determination of the merits of the application based solely on those materials (see *Hancock v Executive Director of Public Health*).¹³
- 51 In determining the review pursuant to section 25(4) of the Act the Commission may do any of the following, namely:
- a) affirm, vary or quash the decision;
 - b) make a decision in relation to any application or matter that should in the opinion of the Commissioner be made in the first instance;
 - c) give directions as to any questions of law reviewed or to the Director to which effect will be given; or
 - d) make any incidental or ancillary order.
- 52 In reconsidering the materials before the Director, the Commission must in this instance assess whether the applicants have satisfied us that the granting of the licence is in the public interest pursuant to section 38(2) of the Act. The expression “in the public interest”,

¹² Transcript pages 14-16

¹³ [2008] WASC 224, [53] per Martin CJ

when used in a statute, imports a discretionary judgment. In the exercise of its discretion, the Commission must take into account the objects of the Act as set out in section 5(1) and is entitled to take into account those matters set out in section 38(4) of the Act.¹⁴

- 53 In considering whether the grant of an application is in the public interest, the Commission is required to consider both the positive and negative aspects of the applications and how the applications will promote the objects of the Act.
- 54 Given that there are objections to the granting of the licences, the Commission must also consider those matters set out in section 74(1) of the Act.

Assessment of the Public Interest – the first application

- 55 The Progressive Trading Pty Ltd application is for a small scale liquor store within the IGA retail area of the Busselton Central Shopping Centre. A Public Interest Assessment (“PIA”) dated 7 December 2011 and attachments were relied upon by the applicant in discharging the onus set out in section 38(2) of the Act.
- 56 The PIA is a comprehensive document that addressed each of the relevant statutory considerations. In summary, it was contended that the application was in the public interest for the following reasons, namely:
- a) the relevant locality is currently underserved in terms of packaged liquor facilities;
 - b) the proposed liquor store would provide one-stop shopping for those who purchased both groceries and liquor;
 - c) the proposed liquor store would be operated and controlled by an experienced management team;
 - d) the granting of the licence would not add in any meaningful way to the harm or ill-health to people due to the use of liquor;
 - e) the impact on the amenity of the location would be positive;
 - f) there is little potential for additional offence, annoyance or disturbance from the proposed liquor store;
 - g) the granting of the licence would cater for the requirements of consumers of liquor.
- 57 The primary evidence relied upon by the applicant were the six attachments to the PIA, they being:
- a) Independent Brands Australia Case Studies

¹⁴ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 per Buss JA at [48] to [52]

- b) Local Commercial Planning Strategy Demand Analysis
 - c) Draft Stock List
 - d) 257 witness petitions
 - e) 27 witness questionnaires
 - f) 35 opinion confirmation letters from witnesses
- 58 Given that this application was dealt jointly with the Woolworths application, the Commission has also considered the evidence in support of that application in determining whether the granting of the licence is in the public interest.
- 59 Having regard to the totality of the evidence, the Commission is satisfied of the following matters, namely:
- a) the granting of a small liquor store licence within a supermarket would not run contrary to the primary object of the Act, that being the minimisation of harm or ill-health caused to people or any group of people, due to the use of liquor;
 - b) the granting of a small liquor store licence will cater for the requirements of consumers of liquor and provide a convenient one-stop shopping option for them;
 - c) there is nothing to suggest that the granting of the licence will contribute adversely to the levels of harm or ill-health that are already caused by the use of liquor within the relevant locality;
 - d) there is nothing to suggest that the granting of the licence will adversely impact on the amenity of the locality in which the premises are to be situated;
 - e) there is nothing to suggest that the granting of the licence will cause offence, annoyance, disturbance or inconvenience to people who reside or work within the vicinity of the proposed licensed premises.
- 60 Accordingly, the Commission is satisfied that the applicant has discharged the onus prescribed by section 38(2) of the Act and established that the granting of the application is in the public interest.

Assessment of the Public Interest – the second application

- 61 The Woolworths Ltd application is for a 206 square metre store within a new retail development. The supermarket will include ten distinct departments, one of which is the proposed liquor store. The source material for the PIA was outlined at tab 20 of Volume one of the materials before the Commission.

62 The PIA and supporting documentation are extremely comprehensive. In summary, the PIA contends that the granting of the proposed licence is in the public interest for the following reasons, namely:

- a) the sale and supply of liquor from the premises will be in a responsible manner;
- b) the premises will provide services and facilities sought out by consumers of packaged liquor;
- c) the premises will introduce diversity of packaged liquor services and facilities into the locality;
- d) the premises will contribute to the proper development of the liquor industry within the locality;
- e) the risk of harm occurring from the sale of liquor will be ameliorated by the manner in which the premises will be operated;
- f) the locality is characterised as an established, growing and popular town in the South West of Western Australia that has no distinct, identifiable issues with liquor related harm;
- g) it has been 13 years since the granting of a liquor store licence within the locality and the area has been the subject of significant growth since that time.

63 Having regard to the totality of the evidence and notorious facts known to the Commission, the Commission is satisfied of the following matters, namely:

- a) the granting of the liquor store licence within a supermarket would not run contrary to the primary object of the Act, that being the minimisation of harm or ill-health caused to people or any group of people, due to the use of liquor;
- b) the granting of the liquor store licence will cater for the requirements of consumers of liquor and provide a convenient one-stop shopping option for them;
- c) there is nothing to suggest that the granting of the licence will contribute adversely to the levels of harm or ill-health that are already caused by the use of liquor within the relevant locality;
- d) there is nothing to suggest that the granting of the licence will adversely impact on the amenity of the locality in which the premises are to be situated;
- e) there is nothing to suggest that the granting of the licence will cause offence, annoyance, disturbance or inconvenience to people who reside or work within the vicinity of the proposed licenced premises;
- f) the applicant is an experienced operator of well run liquor stores within Western Australia.

64 Accordingly, the Commission is satisfied that the applicant has discharged the onus prescribed by section 38(2) of the Act and established that the granting of the application is in the public interest.

Intervention of the Commissioner of Police

65 The Commissioner of Police intervened in the proceedings relating to the second application. He did not support the granting of either application on the basis of a concern that an increase in both the outlet density and the volume of alcohol sold in Busselton will increase the already existing level of alcohol-related harm and offending in the locality.

66 The data before the Commission does not suggest that there are serious levels of alcohol related harm in the locality. Further, it could not be concluded that an increase in outlet density would increase alcohol related harm to what could be considered to be a level over and above that which is commonly accepted in the community. As was noted by Her Honour Wheeler J in *Executive Director of Health v Lily Creek International Pty Ltd & Ors*, the focus in making an assessment of the risk of harm 'is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application.'¹⁵ The risk of harm is not to be considered in an abstract sense, 'but rather the risk having regard to the proved circumstances of the particular area in relation to the application is made.'¹⁶

67 There is no evidence before the Commission that there are currently unacceptable levels of alcohol related harm within the relevant locality or that the granting of the licences would result in such a level of harm resulting.

Objections

68 The objections to the applications are made on the following grounds, namely that the granting of the applications:

- a) would not be in the public interest;
- b) would cause undue harm or ill-health to people, or any group of people due to the use of liquor;
- c) would cause undue offence, annoyance, disturbance or inconvenience to persons in or travelling to or from an existing or proposed place of public worship, hospital or school; (only relates to the second application)

¹⁵ [2000] WASCA 258

¹⁶ supra

- d) would impact on the amenity, quiet or good order of the locality in which the premises are situated;
 - e) would be contrary to the Act.
- 69 The objections primarily related to two propositions, they being that the existing licensed premises in Busselton sufficiently cater for the requirements of consumers of alcohol and that the grant of one or both licences is likely to cause harm to people, or any group of people, due to the use of liquor.
- 70 Pursuant to section 73(10) of the Act, the burden of establishing the validity of any objection lies on the objector. If the Commission is not positively satisfied as to the validity of the objection, the objection will not be made out.
- 71 In assessing the validity of each objection, it is important to consider the entity making the objection. In this instance the objections are made by:
- a) Oakline Pty Ltd, licensee of Albies Bar & Bistro;
 - b) Queens Street Tavern Pty Ltd, licensee of Vasse Café Bar;
 - c) Vasse Holdings Pty Ltd, licensee of Busselton Liquor Store;
 - d) Whilan Holdings Pty Ltd, licensee of the Esplanade Hotel.
- 72 There is a clear inference that the objections are made not on the basis that they are in accordance with the bases for objection set out in section 74(1) of the Act, but to protect the commercial interests of each of the entities that makes the objection. That is not to say that an entity whose commercial interests may be adversely impacted by the grant of a licence cannot make a valid objection; it is simply a matter which the Commission is to give weight in determining whether the validity of the objection has been made out.
- 73 The Commission has considered all of the materials put forward by the objectors at first instance and the submissions made on the section 25 review hearing. Ultimately, the Commission is of the opinion that the objections are nothing more than a collection of bald assertions in response to evidence adduced by each applicant, unsubstantiated claims and irrelevant materials that are made in support of each ground of objection. This conclusion in combination with the fact that we are satisfied that the objections were made to protect the commercial interest of each entity that made the objection is such that the Commission is not satisfied as to the validity of any of the grounds of objection.

DETERMINATION OF APPLICATIONS FOR REVIEW

- 74 On the basis that the Commission is satisfied that each of the applications for liquor store licences satisfies the public interest test articulated in section 38(2) of the Act and that the objections to each application have not been made out, the decision of the delegate of the Director at first instance granting the applications for liquor store licences made by Progressive Trading Pty Ltd and Woolworths Ltd is affirmed.



**SEAMUS RAFFERTY
DEPUTY CHAIRPERSON**