

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

Applicant: Busswater Pty Ltd
(represented by Mr Ashley Wilson of Frichot and Frichot Solicitors)

Objector: Mr K V House and Mrs L V Verhoog

Intervener: Director of Liquor Licensing
(represented by Mr David Leigh of State Solicitors' Office)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Mr Greg Joyce

Date of Hearing: 13 May 2010

Date of Determination: 26 May 2010

Matter: Application for review of a decision of the Director of Liquor Licensing under section 25 of the *Liquor Control Act 1988*.

Determination: The decision of the Director of Liquor Licensing to refuse the application is affirmed.

Authorities cited in determination:

Hancock –v- Executive Director of Public Health [2008] WASC 224

Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241

Introduction

- 1 On 1 September 2009 Busswater Pty Ltd lodged an application for a conditional grant of a liquor store licence for premises to be known as Broadwater Liquor and located at Lot 65/ 545 Bussell Highway, Busselton.
- 2 In decision A201851, dated 8 January 2010 the Director of Liquor Licensing refused the application.
- 3 On 8 February 2010, Busswater Pty Ltd lodged an application for a review of the Director's decision pursuant to section 25 of the *Liquor Control Act 1988* ("the Act").
- 4 On 10 February 2010, pursuant to section 69(11) of the Act, the Director of Liquor Licensing lodged a Notice of Intervention in respect of the review.
- 5 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director of Liquor Licensing, but is to undertake a full review of the materials before the Director and make its own determination on the basis of those materials (refer *Hancock -v- Executive Director of Public Health [2008] WASC 224*).
- 6 A hearing was conducted on 13 May 2010.

Submissions on behalf of Busswater Pty Ltd in support of its application

- 7 The applicant proposes to establish a liquor store, with both browse and drive through convenience, at a disused service station/road house located at lot 65/545 Bussell Highway, Busselton. The site, which has been vacant for the past three years, is located next to the Broadwater Shopping Village and on a major arterial road.
- 8 According to the applicant, the design of the liquor store will enhance the current retail shopping area and attract consumers to the shopping centre, and provide the convenience of one-stop-shopping. Access to the proposed premises from Bussell Highway is traffic friendly and the road design for entry and exit is excellent from both directions due to turning lanes and arrows to direct traffic in and out of the shopping centre.
- 9 The proposed liquor store is in the Broadwater locality of the Busselton Shire approximately seven kilometres from the central business district. The area surrounding the proposed liquor store has a mixture of permanent local residents, short stay accommodation resorts, caravan parks catering for both short stay holidaymakers and long term residents and a retirement village.
- 10 In the Public Interest Assessment document (PIA) submitted with the application, the applicant has sought to address the relevant matters raised under section 38(4) of the Act and asserts that the grant of the proposed licence will not impact negatively on the

harm or ill-health of the community or on the amenity of the area or create offence, annoyance, disturbance or inconvenience to people who reside or work in the area. Details of the demographics of the area were also provided, including regional tourism data for the period 2006, 2007 and 2008 and community statistics from the ABS 2006 Census 1. An overview of the existing premises in the area was also submitted with the applicant providing the following comments:

- Cape Cellars – is a liquor store located 3.2 kilometres from the proposed site on the Bussell Highway, with two other retail outlets. The access is difficult and traffic can be congested at peak times;
- BWS Liquor Abbey – is a liquor store located 2.2 kilometres from the proposed site with two other retail outlets on Caves Road. Access is confusing due to a newly constructed roundabout and parking is inadequate;
- Bayview Geographe Resort – is licensed under a hotel restricted licence and located 500 meters from the proposed site. The resort has a mixture of studio style motel rooms and a range of two and three bedroom apartments. The resort caters for about 450-550 people with onsite food and beverage facilities for guests and the public. The sale of packaged liquor is prohibited;
- Broadwater Beach Resort – has a special facility (tourism) licence and located about 200 metres from the proposed site. The resort has a mixture of hotel sites and two and three bedroom self contained units. The capacity of the resort is about 250 people with onsite food and beverage facilities for guests and the public. The sale of packaged liquor is prohibited;
- Abbey Beach Resort – is located about one kilometre from the proposed site and operates under a special facility (other) licence. The resort has a mixture of hotel studio rooms and two and three bedroom self contained apartments. Onsite food and beverage facilities are provided for both guests and the public, with a capacity of 600-700 people. The sale of packaged liquor is prohibited;
- Busselton Cleanskins – is a liquor store about seven kilometres from the proposed site. The store has a limited range of product and the operating hours are limited to shopping centre hours of 9.00am to 6.00pm Monday to Friday;
- Grand Mercure Apartments – is an unlicensed facility located next door to the proposed site. This facility is a mixture of hotel studio rooms and two and three bedroom self contained apartments, with a capacity of 300-330 people; and
- Broadwater Executive Villas – is located behind the proposed site and has 37 executive style villas providing short term accommodation for up to 250-300 people. There is no food or beverage outlet in the complex, which is unlicensed.

11 Letters of support were received from:

- Mr Jamie Sutton, owner of the Broadwater Pharmacy, stating that he believed the location of the store would better serve both the local and tourist communities and help raise the profile of the existing retailers by attracting additional customers;
- Mr Tony Cox, Strata Manager Broadwater Villas, stating that the owners of the villas had no objection to the application; and
- Mr Phil Smith, Resort Services Manager Grand Mercure Apartments, stating that he had no objection and supports the application because it would provide a service to guests in the Apartments;

12 A Management Plan, House Management Policy and Code of Conduct for the business were submitted in support of the application.

Submissions on behalf of the objector

13 An objection to the application was lodged by Mr K V House and Mrs L V Verhoog. The objectors claim that they already experience problems with drunken louts, who consume liquor at licensed premises in Holgate Road, leave rubbish on their front lawn, vomit in their garden and car port and tamper with their cars. The objectors allege that their health has been affected by these problems and there are already sufficient liquor stores in the area for people to get alcohol.

Denial of procedural fairness

14 In seeking the review of the Director's decision, the applicant claimed that it was denied procedural fairness because the Director of Liquor Licensing took into consideration information which was not lodged by any party to the application; which was not made available to the applicant before the determination of the application; and in relation to which the applicant was not given the opportunity to respond.

15 At paragraph 5, page 4 of the Director's decision he states:

“Current alcohol availability in Busselton is associated with a measurable level of harm in terms of alcohol consumption on (sic) the Statistical Local Area of Busselton and alcohol-related hospitalization in the South West Health Region (incorporating Busselton) compared to corresponding State rates.”

16 By the inclusion of the above paragraph in his decision, the applicant asserts that the Director took into account information, upon which the Director expressed a view about current levels of harm in the South West Health Region, to which the applicant was not afforded the opportunity to respond or provide information to counteract the view expressed by the Director.

17 It is unclear to the Commission why the Director included the above paragraph in his decision, or the relevance of the statement. It appears to have no connection to any

conclusion drawn by the Director, or if it does, that connection or relevance is not made clear in the decision. Also, the Director has not referenced the source of the data relied upon to draw this conclusion.

18 At the hearing of this matter, Mr David Leigh, on behalf of the Director of Liquor Licensing, indicated that the source data was from a report titled “Impact of Alcohol on the Population of Western Australia (2008)”. This document is included in a list of source reports that are detailed in Attachment 1 of the “Public Interest Assessment Submission Guide” which is provided by the Department of Racing, Gaming and Liquor for applicants. The guide provides information as to the matters to which applicants should pay regard when submitting an application for a liquor licence, and Attachment 1 to that guide is entitled “Reports that decision makers may have regard to”. The guide is also available for download from the website of the Department of Racing, Gaming and Liquor.

19 It was asserted on behalf of the applicant, that in view of the findings of Martin CJ in *Hancock –v- Executive Director of Public Health [2008] WASC 224*, particularly para 43 where it was stated:

“So, in any case in which the Director or his or her Delegate propose to make a finding adverse to any party to the proceedings before the licensing authority, it is essential that the relevant party be made aware of the prospect of such a finding, and of the evidence or other materials to be relied upon for the purposes of such a finding, and be given adequate opportunity to present evidence or other materials and submissions to the licensing authority in opposition to that prospective finding.”

the Director should have specifically brought the report to the attention of the applicant and afforded him the opportunity to respond.

20 It was conceded by Mr Wilson that the report was indeed listed on Attachment 1 of the guideline to which his client had access. It was contended however, that notwithstanding that that report may be referenced in the guideline made available by the Department, there are numerous reports referred to in the guideline and applicants should not have to try and find a ‘needle in a haystack’ in order to prepare their submissions.

21 The dictum of the Chief Justice in *Hancock* (supra) concerning procedural fairness is indisputable; however, the Commission sees a clear distinction between the specific circumstances in that case compared to the circumstances in this case. In *Hancock*, the Delegate of the Director formed views based upon a site visit which influenced the determination of the application and Mr Hancock was denied the opportunity to make submissions addressing those views. However, the attention of all applicants is drawn to various reports to which the licensing authority may have regard in determining applications, but the applicant in this case chose not to address the information in that report.

- 22 Although the Commission is of the view that the processes adopted by the Director are possibly unhelpful and it may have been preferable for the Director to correspond with the applicant about his concerns on the health data, failure to do so does not amount to a denial of procedural fairness.
- 23 The Commission finds that the applicant was not denied procedural fairness by the Director in the determination of this matter simply because the Director did not alert the applicant specifically to the report to which he had regard. The guideline is provided for all applicants to assist in the preparation of their submissions and it points applicants to the various reports that decision makers may consider. Harm minimisation is a primary consideration in the determination of all applications (refer to the objects of the Act and section 38(4)) and applicants must accept responsibility for the preparation of their submissions and evidence submitted to the licensing authority on this important issue and address all relevant considerations and source material referred to in the guideline. It is also clear to the Commission, and not disputed by the applicant, that the applicant in this case has used the guideline in the preparation of its Public Interest Submission by the manner in which that document was presented.
- 24 The application will therefore proceed to be determined by the Commission on its merits and in accordance with the provisions of the Act. Nonetheless, it is noted by the Commission that at para 45 in *Hancock* (supra) Martin CJ stated:

“Because the Commission is unable to receive any material other than that which was before the Director at the time of making the decision, if the Director has denied procedural fairness, it will not ordinarily be possible for that denial to be cured in proceedings before the Commission – at least where the cure requires the provision of an opportunity to present evidentiary material. It follows that, in such a case, the only way in which the Commission could uphold the decision of the Director would be if it decided to entirely exclude from consideration the matters upon which the Director relied, and in respect of which procedural fairness was denied. This course could only be followed if the matters to which the Director had regard were irrelevant to the issue under review.”

- 25 Therefore, to put the issue beyond doubt, and as indicated at para 17 above, the Commission is not aware of the relevance of the quoted paragraph in the context of the Director’s decision anyway, and therefore for the purposes of this determination the material that the Director relied upon (ie the report “Impact of Alcohol on the Population of Western Australia (2008)”) is irrelevant and excluded entirely from consideration in the Commission’s determination of this application.

Determination

- 26 Pursuant to section 38(2) of the Act, an Applicant for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.

- 27 Furthermore, pursuant to section 33(1), the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*).
- 28 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities supra*).
- 29 The applicant proposes to provide a browse and drive-through liquor store facility at a disused petrol station located next to the Broadwater Shopping Village on Bussell Highway, Busselton. The proposed store is located in close proximity to a range of short-stay tourist accommodation facilities. The applicant asserts, in the summary of its PIA, that the proposed liquor store will:
- offer a convenience to the customer in the form of both a liquor store browse option and a drive thru service option;
 - offer a professional, convenient and safe environment;
 - create an alternative option for local residents and tourists in the locality of Busselton;
 - add to the economy of the local region and create employment opportunities; and
 - generate activity and income for the local stakeholders in the Broadwater shopping centre.
- 30 Other benefits that the applicant believes, from its PIA, that the proposed store will provide are:
- one-stop-shopping for tourists and local residents who visit the Broadwater Shopping Village;
 - easy access and egress and its location on a major arterial road; and
 - convenient location for tourists staying in the near-by short stay tourist accommodation and for local residents.
- 31 In support of its application the applicant provided:
- Information from Tourism Western Australia with statistical data for 2006, 2007 and 2008 on visitor numbers to the region and occupancy rates on several types of accommodation styles, including hotel, motel and apartments, caravan parks and hostels;
 - Statistics on leisure activities and top 5 local government areas visited during the period 2006, 2007 and 2008;

- Data on the demographics of the region;
- Information on the existing licensed premises and accommodation facilities in the area;
- Letters of support from some local business operators; and
- Management Plan, House Management Policy and Code of Conduct.

32 The Commission finds that the objection lodged by Mr K V House and Mrs L V Verhoog has not been established as required under section 73(10) of the Act. There appears to be little demonstrable relationship between the matters raised by the objectors and the grant of this application, which would authorise the sale and supply of packaged liquor for consumption off the premises.

33 Ultimately, the Commission is of the view that the determination of this application turns on the quality and level of evidence submitted by the applicant to discharge its obligation under section 38(2) of the Act. In this regard, the Commission finds that the applicant has not provided sufficient objective evidence to satisfy the Commission that the grant of the licence is in the public interest.

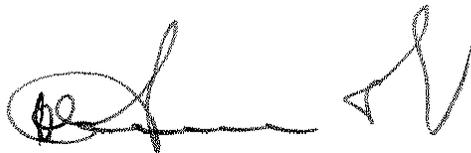
34 The Commission finds that much of the application is based upon assumptions not supported by an appropriate level of evidence. For example, the statistical data submitted by the applicant refers to the Busselton region as a whole, with little relevance to the area surrounding the proposed store or demonstrating, with evidence not general statements, how the grant of the application will cater for the requirements of consumers for liquor and related services or assist in the proper development of the growing tourist industry in Busselton.

35 Whilst it was asserted that the proposed store will provide the convenience of one-stop-shopping, there was no objective evidence that any member of the public patronising the Broadwater Shopping Village, now or in the future, has any requirement to purchase liquor ancillary to their shopping, or that any persons staying, or intending to stay at, any of the surrounding accommodation would find it convenient to purchase packaged liquor from the proposed store. In its PIA, the applicant makes reference to some of the existing licensed premises and accommodation facilities in the locality. The applicant states that:

- the Bayview Geographe Resort, located 500 metres from the proposed store, has a hotel restricted licence and take away liquor is prohibited;
- the Broadwater Beach Resort, located 200 metres from the proposed liquor store, has a special facility licence and take away liquor is prohibited; and
- Abbey Beach Resort, located one kilometre from the proposed liquor store, has a special facility licence and take away liquor is prohibited,

however, the records of the Department of Racing, Gaming and Liquor indicate that the Bayview Geographe Resort can sell packaged liquor to lodgers of the resort; the Broadwater Beach Resort can sell packaged liquor to guests accommodated at the complex; and the Abbey Beach Resort can sell packaged liquor from mini bars. Not only are the statements of the applicant incorrect, but it simply cannot be assumed that persons staying at these resorts for instance, have any requirement or desire to purchase packaged liquor at the proposed liquor store, particularly since they can obtain packaged liquor from the complex in which they are staying.

- 36 In considering the public interest under section 38, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of an application will have on a community (refer *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*). In determining the positive aspects of an application, mere opinions expressed by an applicant as to the perceived benefits of the grant of their application, in the absence of supporting evidence, falls well short of the level of evidence required to substantiate such a claim. In addition, letters of support from business people purporting to speak on behalf of consumers simply does not go far enough to satisfy the Commission that the general public has a requirement for liquor and related services in the manner proposed by the applicant (object 5(1)(c) of the Act). Statements by applicants, without supporting evidence, cannot be construed as facts.
- 37 Consequently, the Commission finds that the applicant has not provided sufficient evidence to satisfy the Commission that the grant of the licence is in the public interest as required under section 38(2) of the Act. Accordingly, the application is refused.



JIM FREEMANTLE
CHAIRPERSON