

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

REASONS FOR DETERMINATION OF MR SEAMUS RAFFRTY (CHAIRPERSON)

Background

- 1 Australian Leisure and Hospitality Group Pty Ltd (“the applicant”) has applied for the alteration/redefinition of the Peninsula Tavern, Maylands pursuant to section 62 of the *Liquor Control Act 1988* (“the Act”). The Commissioner of Police (“Police”), Chief Health Officer (“CHO”) and City of Bayswater have intervened in the proceedings. The Commissioner of Police also objects to the granting of the licence along with thirteen other parties.
- 2 The history of the matter is as follows:
 - a. 15 April 2014 – the applicant filed the application for the alteration/redefinition of the licensed premises;
 - b. 7 November 2014 – the Director of Liquor Licensing (“the Director”) referred the application to the Liquor Commission of Western Australia (“the Commission”) for determination pursuant to section 24 of the Act;
 - c. 2 September 2015 – the hearing of the application was conducted by the Commission;
 - d. 4 February 2016 – the majority reasons of the Commission were published, with the application being refused;
 - e. 20 October 2016 – hearing of the applicant’s appeal to the Supreme Court against the majority decision to refuse the application;
 - f. 30 March 2017 – Banks-Smith J upheld the appeal and the matter was remitted to the Commission for re-hearing; and
 - g. 26 April 2018 – the re-hearing of the application was conducted by the Commission.
- 3 In upholding the Supreme Court appeal, Her Honour Banks-Smith J stated that, ‘taking into account the respective submissions of the parties, I do not consider the Reasons reveal that the Commission gave proper, genuine and realistic consideration to the matters relevant to the section 5(1)(c) object when the scope of that object is properly understood.’¹
- 4 I have been provided with the draft reasons of Deputy Chairman Watling and Commissioner Egan in which they again refuse to grant the application on the basis that the applicant has not demonstrated that the granting of the application is in the public interest. As at first instance, I disagree with that decision and have determined that:

¹ *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 at [97]

- a. the applicant has discharged the onus prescribed by section 38(2) of the Act and established on the totality of the evidence that the granting of the application would be in the public interest;
- b. that the objectors have not discharged the onus prescribed by section 73(10) of the Act and established any of the grounds of objection set out in section 74(1) of the Act; and
- c. that the application should be granted on conditions.

Statutory framework for consideration of application

5 In *Woolworths Ltd v Director of Liquor Licensing*² His Honour Buss JA set out the statutory framework for a determination of an application in which an applicant had to satisfy the Commission that the granting of an application was in the public interest in the following terms:

- a. by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
- b. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;³
- c. the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest, are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
- d. the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest, are those set out in section 38(4) of the Act;
- e. section 5(2) is mandatory whereas section 38(4) is permissive; and
- f. on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - (i) catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - (ii) facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

² [2013] WASCA 227

³ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute.

- 6 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- a. the grant of the application would not be in the public interest; or
 - b. the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
 - c. that if the application were granted:
 - (i) 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 be likely to occur; or
 - (ii) the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened; and
 - d. that the grant of the application would otherwise be contrary to the Act.
- 7 Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests.⁴

Summary of the evidence

- 8 For the purposes of these reasons, I adopt the summary set out in the reasons of the majority and in the reasons at first instance. Based on the totality of the evidence filed in respect to this application, the fundamental issues for resolution are:
- a. what are the levels of harm of ill-health currently experienced within the relevant locality;
 - b. what are the likely levels of harm or ill-health that are likely to be experienced if the application were granted; and
 - c. does the primary object outlined in section 5(1)(c) of the Act take precedence over the primary object outlined in section 5(1)(b) in the event that a determination is reached that there is likely to be an increase in harm and ill-health were the application to be granted.
- 9 It should be noted that the Commission has been provided within voluminous amounts of materials in respect to this application. The mere fact that something has not been specifically referred to, does not mean that the material has not been considered.

⁴ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

Issues relating to harm and ill-health

- 10 The approach that the Commission must adopt in its determination of this application is that outlined by His Honour Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208. Based on that decision, the Commission is required to:
- a. make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b. make findings about the likely degree of harm to result from the grant of the application;
 - c. assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - d. weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant had satisfied the Commission that it was in the public interest to grant the licence.

What are the existing levels of harm and ill-health in the locality due to the use of liquor?

- 11 A significant amount of material has been filed by all parties in respect to this crucial issue which can be characterised as follows:
- a. the existence of at-risk groups who reside or seek assistance within the locality;
 - b. statistics in respect to alcohol related incidents in the locality;
 - c. statistics in respect to alcohol related hospitalisations for persons in the locality;
 - d. anecdotal evidence of persons residing or working within the locality; and
 - e. a suggestion that alcohol availability increases harm.
- 12 There is no doubt that there are a number of at-risk persons who live or seek assistance from service providers that operate in the locality. The Commission has received materials from:
- a. Mr Damien Walsh, Director of Shopfront;
 - b. Mr Peter Duncan, Cyrenian House;
 - c. Mr Stephen Conway, Parish Priest at St Luke's Anglican Church; and
 - d. Ms Maria McAttackney, CEO at Nyoongar Outreach Services.
- 13 The totality of the evidence received from the Service Providers suggests that the addition of a liquor store that promotes and sells cheap liquor will ultimately result in a detriment to those who avail themselves of the assistance of the Service Providers.

- 14 The CHO referred to the number of alcohol related assaults within the location. The data in respect to domestic assaults over a period of 40 months revealed that 34.26% were alcohol related. In respect to non-domestic assaults over the same 40 month period, 28.11% were alcohol related. Putting the percentages to one side, the data reveals that:
- a. over a period of 1,186 days, there were 172 domestic assaults that were alcohol related, which equates to approximately one incident per week; and
 - b. over a period of 1,186 days, there were 167 non-domestic assaults, which also equates to one incident per week, which also takes into account the figures for Mt Lawley which has an entertainment precinct.
- 15 It could hardly be concluded based on these statistics that there were high levels of harm and ill-health occasioned by the use of liquor within the locality during the relevant period.
- 16 As to the hospitalisation rates, the statistics reveal that during the relevant periods alcohol related hospitalisations within the locality were marginally higher than the State average. Overall, the hospitalisation rate was 1.07 times higher than the State average. Again, it could not be concluded on these figures that there are high levels of harm and ill-health attributable to the use of liquor.
- 17 I do not consider that the anecdotal evidence of anti-social behaviour and street drinking, such as that referred to by Ms Lisa Baker is so compelling as to determine that there are high levels of harm and ill-health occasioned by the use of liquor. I accept that such behaviour does occur within the locality, but cannot conclude that the mere fact that it exists should lead to the conclusion that is submitted by the Intervenors and Objectors.
- 18 Much is made by the Intervenors and Objectors as to the availability of low cost alcohol if the application were granted. Reference is made to a number of studies in which it is concluded that the lower the price of alcohol, the greater the likelihood that consumption will increase. The real issue in this application is whether the availability of low cost alcohol will result in an unacceptable increase in harm and ill-health to those who fall within the at-risk category in the locality.
- 19 Ultimately, I cannot conclude that the levels of harm or ill-health within the locality are high. Whilst I acknowledge that harm and ill-health exists within the locality, I cannot conclude that the levels of such harm are significantly higher than other areas within the State of Western Australia based on a consideration of all of the evidence filed by the parties.

What is the likely degree of harm that will result from the granting of the application?

- 20 It should be noted that there is already a BWS liquor store operating from the premises the subject of this application. There is already low cost alcohol available to persons who reside or resort to the locality as things currently stand. The issue for consideration is whether the operation of a much larger liquor store will increase the levels of harm and ill-health already experienced in the locality.
- 21 The primary submission of the Intervenors and Objectors is that if there is more alcohol for sale and at a lower cost, then there must be an increase in harm and ill-health that arises

from this. Further, at-risk persons are highly vulnerable and susceptible to alcohol-related harm and are acutely affected by fluctuations in alcohol prices.

22 In response to these submissions, the applicant refers to the significant harm minimisation measures that would be put in place and its reputation, previously held by the Commission, that it is a responsible seller of alcohol and is well managed.

23 It is always difficult to predict what may occur if a particular application is granted. It involves a prediction as to the likelihood that something may occur. In the context of this application, in which there is already a liquor store on the site of the premises, I consider that the likelihood of harm and ill-health increasing exists, but not to levels that would be considered of such a level as to make it inappropriate to grant the application.

24 I maintain the following observations from my original decision in respect to this application, they being:

‘The mere existence of “at-risk” persons in a locality is not of itself enough to form a conclusion that such persons will be at a greater risk of further harm or ill-health if the application is granted. Other factors must be taken into account, including:

- a) In the context of this application, there is already a licensed premise in existence from which alcohol may be purchased;*
- b) The Commission has repeatedly made positive findings in respect to the operation of Dan Murphy’s outlets and the responsible service of alcohol and other measures taken by the operator to minimise harm and ill-health.*

The Commissioner of Police descended into much detail about the pricing policies of Dan Murphy’s. It was effectively submitted that the applicant sold liquor at prices that would be favoured by vulnerable groups and problem drinkers. That may well be the case, however there is no evidence to suggest that those persons would be consuming more liquor than they already consume and as such would be at greater risk of harm or ill-health than currently exists.

It should also be noted that the primary object of the Act is the minimise harm or ill-health, not eradicate it.’

Assessment of the likely degree of harm to result from the grant of the application against the existing degree of harm

25 This consideration involves an assessment of what levels of harm and ill-health will be reached in comparison to the levels as they currently exist. The exercise was described by His Honour Edelman J in the following terms:

‘In assessing...whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from

*the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated.*⁵

- 26 As already noted, I do not consider that the existing levels of harm and ill-health are of a particularly high level, albeit I accept that there are at-risk persons who are assisted by Services Providers within the locality, however that this is a relatively small number when compared with the overall population within the locality.
- 27 Notwithstanding the fact that there is a potential for an increase in harm and ill-health in the locality of the application were granted, it would not be to a degree or level that would be considered unacceptable.

Weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant had satisfied the Commission that it was in the public interest to grant the licence

- 28 The benefits of the proposed redevelopment have been described as follows:
- a. a transition from the current outdated venue to a new high quality modern, family-friendly bistro;
 - b. elimination of risk factors associated with the current venue, including improved design of safety features and full security upgrade to the redevelopment;
 - c. increased amenity to the area adding to the evolving local precinct which is developing in the area;
 - d. provision of a high end packaged liquor store committed to responsible management;
 - e. reduced closing time from the current 12.00 midnight closing time on weekends for the BWS store to 9.00 p.m. for the Dan Murphy's store;
 - f. employment opportunities;
 - g. elimination of drive-through access to the liquor store; and
 - h. development of facilities including the bistro, liquor store, car park and landscaping that better integrate the surrounding neighbourhood and effectively manage traffic flow and access.
- 29 Further to these considerations is the changing demographic within the location relevant to the application. The evidence contained within the applicant's Public Interest Assessment reveals the following matters:
- a. since 2006, the population of Maylands has increased by 17%;
 - b. the Socio-Economic Advantage/Disadvantage rank for the locality is a rating of 6 on a state-wide basis and a 7 on a national basis;

⁵ *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC at [57]

- c. income levels are higher than the State average; and
 - d. unemployment is slightly below the State average.
- 30 The following observation of Her Honour Banks-Smith is relevant to this determination:
- ‘However, in this case, it would seem that the changing demographic of the community and the introduction of a different offering in terms of consumer choice and diversity are important matters for evaluation and the Commission ought to have proper regard to them, which means not only stating conclusions but revealing an analysis of the relevance of those matters.’⁶*
- 31 The evidence discloses the changing nature of the locality. There is now a level of affluence within the locality and it is not the socially disadvantaged area that was described by some of the parties, albeit there are areas within the locality experiencing social disadvantage. The proposed premises will provide a level of choice, diversity and service that does not currently exist in the locality. The granting of the licence is therefore consistent with the primary object of the Act set out in section 5(1)(c), that being the object 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.

Determination

- 32 Having regard to the totality of the evidence, I am satisfied on the balance of probabilities that the applicant has established that the granting of the application is in the public interest for the following reasons:
- a. the granting of the application will result in tired and outdated premises being redeveloped into a modern and appealing development, which will include a bistro;
 - b. part of the development will include a large Dan Murphy’s liquor store, offering a variety of diverse products and levels of service that do not currently exist in the locality;
 - c. the applicant is an experienced, well regarded and responsible operator of licensed premises;
 - d. the demographic of the locality in which the proposed premises will operate is changing and is becoming more affluent;
 - e. the current levels of harm and ill-health in the locality are not of such a level that could be described as being significantly different from other similar areas in the State;
 - f. the issues of harm and ill-health that may arise from the granting of the application are not of such a degree that the application should be refused;
 - g. the number of at-risk persons in the locality is only a very small percentage of the approximately 32,000 people who reside in the locality; and

⁶ *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 at [101]

h. the granting of the application would not significantly affect the amenity of the area, particularly in respect to traffic flow. Having regard to what currently exists, compared to what is proposed, the granting of the application would significantly enhance the amenity of the location.

33 Given the matters raised at paragraph 32, I am not satisfied that the objectors have discharged their onus of proof on balance. Many of the matters raised are speculative in nature, lacking in cogent evidence or based on generalised studies that do not assist in a determination of this application. The data relied upon by the Police in its intervention when scrutinised, does not reveal the conclusions that are sought, with specific reference to crime and hospitalisation numbers. Certain oral submissions made by an objector at the hearing of this application seemed to be based on emotion as opposed to cogent evidence. As has previously been noted by the Commission in other decisions, results of surveys by a particular party will be viewed cautiously as it cannot always be concluded that such surveys have been conducted impartially. None of this is a criticism of any party, as it is accepted that the objections have been made in good faith. It is simply a summary of the issues that I considered relevant in assessing the relevant evidence and submissions relied upon by the objectors.

34 Accordingly, I would grant the application for alteration/redefinition of the licensed premises.



SEAMUS RAFFERTY
CHAIRPERSON