

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

Applicant: Shallcross Investments Pty Ltd
(represented by Mr R Nash, instructed by AVA Legal)

Intervener: Director of Liquor Licensing
(represented by Ms E Mills of the State Solicitor's Office)

Commission: Mr Jim Freemantle (Chairman)
Ms Helen Cogan
Mr Greg Joyce

Date of Hearing: 9 July 2010

Date of Determination: 29 July 2010

Matter: Application for the conditional grant of a liquor store licence for premises to be known as Malibu Wine Room

Determination: The application is refused

Authorities cited in determination:

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

Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010

Palace Securities v Director of Liquor Licensing [1992] 7WAR 241).

Introduction

- 1 On 30 December 2009 an application was lodged by Shallcross Investments Pty Ltd ("the applicant") for the conditional grant of a liquor store licence for premises to be known as Malibu Wine Room and situated at the Malibu Shopping Centre, 110-116 Malibu Road, Safety Bay.
- 2 In decision A204614 dated 5 March 2010 the Director of Liquor Licensing refused the application.
- 3 On 1 April 2010 Shallcross Investments Pty Ltd lodged an application, pursuant to section 25 of the *Liquor Control Act 1988* ("the Act") for a review of the Director's decision.
- 4 By a notice dated 4 May 2010 the Director of Liquor Licensing intervened in the proceedings before the Commission, pursuant to section 69(11) of the Act.
- 5 In conducting a review under section 25 of the Act, the Commission is not constrained to the 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 before the Commission was conducted on 9 July 2010.

Submissions on behalf of the applicant for the conditional grant of a liquor store licence

- 7 According to the applicant's Public Interest Assessment (PIA), the applicant wishes to provide a new, independent liquor store in a convenient location with an emphasis on good service and quality products, including organic/bio-dynamic and local Peel Region wines. It is proposed to also source exclusive products from a wholesale business known as the Wine Room, which is operated by one of the directors of the applicant company.
- 8 The proposed liquor store will be 110m² and will be located in the Malibu Shopping Centre, Malibu Road, Safety Bay. The Malibu Shopping Centre is a small complex that includes an IGA Supermarket, Malibu Fresh Essentials (a growers mart specialising in organic and locally produced food), a fish and chip takeaway, florist, Chinese restaurant and a pharmacy. This site was specifically chosen for the proposed liquor store in order to complement the existing businesses, particularly Malibu Fresh Essentials. It was asserted that customers who have a preference for organic and locally produced food are also likely to prefer organic or locally produced liquor. Also, people who shop at the IGA Supermarket and customers of the Chinese restaurant will also find it convenient to be able to obtain liquor from the proposed liquor store.

9 The three directors of the applicant company are experienced businessmen with one of them having been in the liquor industry for over 18 years. All three gentlemen have completed training in the responsible service of alcohol and will be involved in the day-to-day running of the proposed premises.

10 It was submitted that the grant of the application will be in the public interest for the following reasons:

- patrons will be provided with the convenience of one-stop-shopping as they will be able to purchase liquor while completing their grocery and other purchases at the Malibu Shopping Centre;
- being an independent liquor store, the applicants will be able to cater to the interests of local residents, particularly those who attend the shopping centre for the organic products available at Malibu Fresh Essentials. Liquor stores which are part of the national chains are restricted to a set model of product lines, however the applicants will be able to offer products that match the produce available at Malibu Fresh Essentials and provide liquor which is unavailable at other liquor stores in the area.
- it will cater for the growing number of consumers of organic products, who will be able to purchase organic beverages with organic foods;
- it will allow patrons to purchase unique beverages that are not presently available in the area;
- it will add to the amenity of the highly populated community; and
- there is local support from the two grocery operators in the Malibu Shopping Centre.

11 The applicant's PIA addressed the matters set out in section 38(4) of the Act, with data provided on the existing level of crime in the locality; the social profile of the locality; local population and demographics; and an analysis of tourism data. The applicant also identified the existing liquor stores in the locality and provided information on the initiatives it would adopt to minimise alcohol-related harm in the area.

Submissions on behalf of the Director of Liquor Licensing

12 It was submitted on behalf of the Director of Liquor Licensing that the application was generally characterised by speculation and assertion, which was unsubstantiated by any evidentiary foundation.

13 In addition, because the promotion of the objects of the Act are relevant to the consideration of the public interest, in order to demonstrate that an application for a licence is in the public interest an applicant is to be expected to demonstrate that their proposed development would "cater for the requirements of consumers for liquor and related services."

- 14 In the instant case the applicant did not provide any evidence that the application was directed towards satisfying the requirements of consumers for liquor and related services and therefore the applicant has failed to demonstrate that the objective in section 5(1)(c) of the Act has been met.

Determination

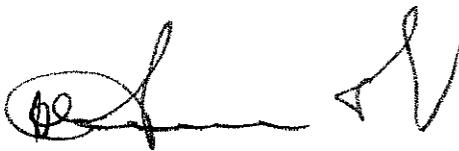
- 15 Pursuant to section 38(2) of the Act, an Applicant for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.
- 16 Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material, including the Second Reading Speech to a Bill, when considering the meaning and intent of a written law.
- 17 During 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*) the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, 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."

- 18 Consequently, for an applicant to discharge its onus under section 38(2) of the Act, it must address both the positive and negative impacts that the grant of the application will have on the local community. However, as previously observed by the Commission (refer *Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010*), it is not sufficient for an applicant merely to express opinions about the perceived benefits of their application. Such opinions and assertions must be supported by an appropriate level of evidence.
- 19 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities v Director of Liquor Licensing [1992] 7WAR 241*).
- 20 The applicant seeks to establish a new, independent liquor store, in the Malibu Shopping Centre. In its PIA, the applicant has addressed the matters set out in section 38(4) of the Act and asserted that the local community will benefit from the grant of the application because:
- patrons will be provided with the convenience of one-stop-shopping;

- the grant of the application will cater for the growing number of consumers of organic products, who will be able to purchase organic beverages with organic foods; and
 - patrons will be able to purchase unique beverages that are not presently available in the area.
- 21 These are the key benefits to the community according to the applicant, although no evidence was submitted to support these claims.
- 22 Therefore, whilst, on the balance of probability and the evidence submitted, the Commission is satisfied that the grant of the application will not negatively impact on the local community; the Commission is of the view that the applicant has not adduced sufficient evidence directed to demonstrating the positive impacts that the grant of the application will have.
- 23 Due to the lack of evidence presented, the Commission is unable to determine whether any member of the local community has any desire or requirement to purchase liquor whilst purchasing other goods at this shopping centre; the extent to which people may wish to purchase organic beverages with organic foods; and whether there is any requirement for members of the public to purchase unique beverages which are not presently available in the area. These are the matters to which object 5(1)(c) of the Act would relate.
- 24 The private interests of an applicant should not be confused with the public interest. Simply because an applicant wishes to establish a liquor outlet in a particular locality does not mean that a licence should automatically be granted. The requirements of the Act, particularly section 38(2), are directed to ensuring a balanced approach is taken by the licensing authority to the granting of new applications. As indicated by the Hon Mark McGowan in the Second Reading Speech, the proliferation of liquor outlets is not in the public interest.
- 25 During the hearing before the Commission, Mr Nash, on behalf of the applicant, submitted that if the Commission is of the view that the applicant has not provided sufficient evidence to support its claims, it is open to Commission to quash the decision of the Director of Liquor Licensing and remit the application back to the Director so that the applicant is afforded an opportunity to provide further evidence.
- 26 Mr Nash stated that the Act is predicated on an informal and flexible approach being adopted by the licensing authority. Consistent with this underlying principle, and the PIA guidelines prepared by the Department of Racing, Gaming and Liquor, Mr Nash contended that the Director of Liquor Licensing should have requested further information from the applicant. The applicant, according to Mr Nash, has followed the expressed requirements of the Department's policy document in the preparation and submission of its PIA. By remitting the application back to the Director of Liquor Licensing, the application can then be properly determined on its substantive merits.

- 27 The Commission cannot accede to this request, for to do so would be untenable. It would result in any party to proceedings before the Commission under section 25 of the Act, who has not fulfilled their obligations, seeking to have the matter remitted to the Director of Liquor Licensing so that they can be afforded another opportunity to prove their case.
- 28 Notwithstanding the various provisions of the Act which provide for an informal and flexible liquor licensing system, the licensing authority cannot run an application, objection or intervention on behalf of the individual parties because to do so would place the licensing authority in an unsustainable position.
- 29 Section 38(2) of the Act places a clear onus on an applicant to satisfy the licensing authority that the grant of the application is in the public interest. Based upon the evidence presented in this case, the Commission is of the view that the applicant has failed to demonstrate that the grant of the application is in the public interest and accordingly, the application is refused.
- 30 In hearing this application, and other recent applications, it is apparent to the Commission that this applicant, like many others, has quite reasonably and sensibly relied heavily on the Policy document of the Director of Liquor Licensing in the preparation of their submissions and Public Interest Assessment submitted in support of their application. Pursuant to section 38(2) of the Act, applicants must satisfy the licensing authority that the grant of the application is in the public interest. In this context, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of the application will have on the community. Consequently, the Commission is of the view that it would be helpful to applicants if the Director's policy in respect of the PIA could perhaps highlight more clearly the requirement for applicants to adequately demonstrate the positive aspects of their application and provide evidence to support their claims. :



JIM FREEMANTLE
CHAIRPERSON