

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

Applicant: Repertoire Wines Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack Lawyers)

Intervener: Director of Liquor Licensing
(represented by Mr Sam Nunn and Ms Hannah Stapp of State Solicitor's Office)

Objectors: Yawarra Holdings Pty Ltd and Others
(represented by Mr Dan Mossenson and Mr Alec Weston of Lavan Legal)

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan
Mr Greg Joyce

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

Premises: The Cellar Door (Repertoire)

Date of Hearing: 2 August 2011

Date of Determination: 16 September 2011

Determination: The decision of the Director of Liquor Licensing is affirmed and the application is refused

Authorities considered in the determination:

- *Shallcross Investments Pty Ltd v Director of Liquor Licensing LC 26/2010*
- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345*
- *Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010*

- *Liquorland (Australia) Pty Ltd v Hawkins* (1997) 16 WAR 325
- *Ventorin Pty Ltd v Director of Liquor Licensing LC 04/2009*
- *Element WA Pty Ltd v Director of Liquor Licensing LC 32/2010*
- *Harold Thomas James Blakely v Director of Liquor Licensing LC 44/2010*
- *Hancock v Executive Director Public Health [2008] WASC 224*
- *Palace Securities Pty Ltd and Another v Director Liquor Licensing* (1991) 7 WAR 241

Background

- 1 On 17 March 2010 the applicant applied to the Director of Liquor Licensing ("the Director") for the conditional grant of a liquor store licence for premises to be known as the Cellar Door (Repertoire) at 62 Bussell Highway, Cowaramup.
- 2 On 7 May 2011 the Cowaramup District Social Club lodged a letter of objection to the granting of the licence.
- 3 On 10 May 2011 thirteen (13) objections and supporting statutory declarations were lodged by Lavan Legal on behalf of:
 - Maxwell Robert Montgomery – grape grower and wine producer
 - John Robert Frazer and Janice Woods – wine producer
 - Patricia Anne Tassell – wine producer
 - Barry Leonard Granville – real estate agent
 - Alan Peter Woods – manager, wine producer
 - Norman Roy Williamson – Cowaramup businessman
 - Alastaire Malcolm Gillespie and Vinpro Management Pty Ltd – wine wholesaler and producer
 - Brian Napier George Lowrie – grape grower and employee of wine producer
 - Kymberly Nicole McDonald – wine producer
 - Stephen Wayne Olsen and Olsen Wines – grape grower and wine producer
 - Russell Barry Reynolds and Basewood Pty Ltd – grape grower and wine producer
 - Brett Darryl Roberts and Canebreak Estate – grape grower and wine producer
 - Yawarra Holdings Pty Ltd – Margaret River Regional Wine Centre
- 4 On 21 June 2010 the Director allowed the applicant to amend the application to specify an alternative premises and on 20 October 2010 the applicant submitted an amended application together with a Public Interest Assessment ("PIA") for a liquor store at 64 Bussell Highway Cowaramup.
- 5 By correspondence dated 10 February 2011 the Director advised Lavan Legal that in respect of seven of the objectors it had been determined that they would not be heard as they did not base their objections on one of the grounds prescribed in section 74(1) of the *Liquor Control Act 1988* ("the Act"). This decision was contested by Lavan Legal in correspondence dated 17 and 24 March 2011.
- 6 In decision A218375 ("the decision"), dated 6 May 2011, the Director refused the application on the basis that the application was not sufficiently made out to satisfy the Director that, on the balance of probabilities, the granting of the licence would be in the public interest.
- 7 By application dated 23 May 2011 the applicant sought a review of the decision by the Liquor Commission ("the Commission") pursuant to section 25 of the Act.

8 In correspondence dated 3 June 2011 the Director gave notice of his intervention pursuant to section 69(11) of the Act.

9 A hearing of the matter before the Commission was held on 2 August 2011.

Submissions of the Applicant

10 The applicant proposes to:

- a) Stock wines from wineries not exceeding 800 tonnes in capacity.
- b) Actively work to promote small niche wineries.
- c) Supply both visitors and local residents with boutique beers from the Margaret River region, as well as Australia and around the world.
- d) Sell international boutique beers.
- e) Provide a service whereby the consumer may taste some of the wines and beers before purchasing.
- f) Provide visitors with knowledge of the local wineries and breweries
- g) Stock a range of international wines and spirits.
- h) Provide a service to tourists frequenting the locality.
- i) Have the majority of the wines in the store produced by Repertoire Wines

11 The applicant, citing *Shallcross Investments Pty Ltd v Director of Liquor Licensing LC 26/2010* and the second reading speech of the *Liquor and Gaming Legislation Amendment Bill 2006*, referred to the requirement for an applicant to demonstrate, and the licensing authority to consider, the positive impacts upon the community from the granting of this licence, as detailed in paragraph 10 above.

12 The applicant stated that the anti-competitive test has been removed from the Act and replaced by the public interest test and as a consequence the Commission must apply the latter in assessing the application.

13 It was submitted that the correct approach is to determine whether consumers would have a requirement for the services proposed to be offered.

14 The manner in which the applicant's venue proposed to operate has been outlined in the PIA (and 10 above) and it was submitted that the grant of the application will not cause harm or ill health to any person or group of people. With the exception of children and young persons, the 2001 census for Cowaramup did not identify any "at risk" groups. The social health indicators for the locality reveal that the rate of alcohol related hospitalisation for the Augusta/Margaret River area for the period 2002 to 2006 is similar to the corresponding state rate.

15 Neither the Commissioner of Police nor the Executive Director of Public Health intervened in this application and the Director did not find in his decision any matters in respect of harm or ill health, impact on the amenity of the locality or offence, annoyance, disturbance or inconvenience pursuant to section 38(4) of the Act. The applicant would not stock products identified as at risk such as premixed spirits with energy drinks.

- 16 The central issue in this review is whether the application is consistent with the object of the Act contained in section 5(1)(c) namely to cater for the requirements of consumers for liquor and related services. The evidence submitted in this regard is outlined in paragraphs 50 and 51 of the applicant's submission dated 20 July 2011 and included six letters from individuals supporting the application and 10 supportive questionnaire responses.
- 17 The applicant cited *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345* and section 25(2c) of the Act and submitted that additional letters from three of those providing written support as referred to in 16 above and which were not considered by the Director in making his decision, should be considered in this review. These letters were obtained by the applicant to refute the claim by the Director in his decision that "there is no clear indication from these people of them being potential consumers of liquor and related services at the proposed liquor store".
- 18 It was contended that the approach adopted by the objectors and apparently accepted by the Director (see page 5 of his decision) suggests that in determining whether or not an application is in the public interest, an applicant is required to demonstrate that the grant of the application will satisfy an unmet requirement of consumers.
- 19 In submissions dated 17 March 2011 and 24 March 2011 the applicant provided a detailed response to the objections and on 26 July 2011 filed a further responsive submission in which it is stated – "with the repeal of the '*reasonable requirements of the public*' test, it is no longer necessary for an applicant to satisfy the licensing authority that when the existing licensed premises within a locality are considered, there is both a subjectively, and objectively reasonable requirement for liquor and related services. Such an approach would merely seek to protect the market share of the existing licensed premises, and, it was this anti-competitive approach to the grant of liquor licences which was abolished by the 2006 amendments to the Liquor Act".
- 20 The correct approach is to determine whether the available evidence demonstrates that the grant of the application would be consistent with the object of catering for the consumer.
- 21 It was submitted that if the application for review was unsuccessful, section 38(5) would apply and preclude the applicant from reapplying for a licence for the same premises for a period of three years. This is considered unfair, particularly as the applicant was unrepresented when lodging the application. The Commission was asked to exercise its discretion in the application of section 38(5) should the application be refused.

Submissions of the Objectors

- 22 The objection lodged by the Cowaramup District Social Club listed the following grounds of objection:

- there is already a liquor store in town and as Cowaramup is a small community the viability of a third liquor outlet would be questionable;
- the granting of a new licence would not be in the best interests of the community as the proposed outlet is in the centre of town and near to the school bus drop off and pick up point;
- the new premises may cause harm and ill health in the community.

- 23 The grounds of objection for each of the 13 objections lodged through Lavan Legal on 13 May, 2011 were similarly stated and incorporated the following:
- the grant of the application would not be in the public interest (section 74(1)(a));
 - That the grant of the application would otherwise be contrary to the Act (section 74(1)(j)).
 - the grant would not be consistent with the objects of the Act (section 5(1)(b)) and (section 5(1)(c));
 - the grant would not be consistent with the objects of the Act (section 5(2)(a));
 - the grant of the application may cause harm and ill health to people in the region (section 74(1)(b));
 - the grant of the application may cause undue offence, annoyance, disturbance or inconvenience to persons travelling to or from a school (section 74(1)(g)(i));
 - that if the application were granted the amenity, quiet and good order of the locality in which the proposed premises are to be situated would be lessened (section 74(1)(g)(ii)).
- 24 The objectors submitted that the applicant has failed to discharge his obligations under the Act particularly in respect of section 38(2), the public interest test. The applicant presented a “threadbare argument”, a “flimsy case” of “no material significance” and which lacked probative value. The line of Commission cases such as *Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010* and *Shallcross Investments Pty Ltd* (*supra*) were cited as similar examples of applications lacking sufficient evidence.
- 25 The objectors asserted that the quality of the evidence of the objectors in contrast is high and they have discharged their onus under section 73(10) of the Act. The objectors provided a table listing and challenging five of the reasons provided by the applicant for the grant of the licence. The objectors argued that the existing facilities adequately cater for these matters and that 123 respondents to a customer catchment survey concerning packaged liquor services provide clear evidence of consumer requirements.
- 26 Over ninety percent (97.56%) of the participants in the survey referred to in paragraph 26 above stated that the Margaret River Regional Wine Centre (“the MRRWC”) was not lacking in choice of packaged liquor, 99.19% said that they did not want another takeaway liquor store near to it and 80.49% said they thought harm or ill health may result from having two liquor stores close to each other.
- 27 The objectors also provided a table comparing the applicant’s objective evidence in support of the grant of the licence with the objectors’ objective evidence against the grant of the licence.

- 28 It is contended that in respect of the objects of the Act the grant is not warranted to cater to the requirements of consumers of liquor (section 5(1)(c)). If the Commission were to uphold the review such a decision would disregard the proper development of the liquor, tourism and hospitality industries and no case has been made out to support the diversity of requirements argument (section 5(2)(a)).
- 29 In respect of the applicant's submissions (referred to in paragraph 16 above), the applicant has failed to produce the appropriate level of evidence to demonstrate that the grant of the proposed licence is warranted to cater to the requirements of consumers of liquor – (section 5(1)(c)).
- 30 The grant of the licence would also not be an appropriate outcome in the context of regulating the sale and supply of liquor (section 5(1)(a)) and a decision to refuse the application would assist in minimising harm and ill-health caused to people, or any group, due to the use of liquor (section 5(1)(b)).
- 31 Cowaramup is a small country town (population 400/600) and is already well served by the MRRWC and there will be no added benefits to regional tourism from the introduction of international beers and wine products that would compete with the local product and dilute the wine region's unique appeal.
- 32 This is an application based on private interest not public interest.

Intervener's Submissions

- 33 The Director intervened in the application for review on the question of the nature of evidence to be provided by an applicant in order to discharge the onus cast on the applicant by section 38(2) of the Act.
- 34 The onus is on the applicant to satisfy the Commission of the merits of the application. It is incumbent on the applicant to adduce sufficient information to satisfy the Commission that it is in public interest to grant the application. (*Busswater Pty Ltd (supra); Liquorland (Australia) Pty Ltd v Hawkins (1997) 16 WAR 325; Ventorin Pty Ltd v Director of Liquor Licensing LC 04/2009*).
- 35 To discharge the onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the community (*Element WA Pty Ltd v Director of Liquor Licensing LC 32/2010* and *Shallcross Investments Pty Ltd (supra)*).
- 36 The Commission has previously considered that it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of an application. Such opinions and assertions must be supported by an appropriate level of evidence. Statements by applicants, without supporting evidence, cannot be construed as facts.

- 37 The private interests of an applicant wishing to establish a liquor outlet should not be confused with the public interest. The requirements of the Act are directed to ensuring that the licensing authority takes a balanced approach to the granting of new applications (*Shallcross Investments Pty Ltd (supra)* and *Harold Thomas James Blakeley v Director of Liquor Licensing LC 44/2010*).
- 38 Section 5(1)(c) of the Act refers to the proper development of the tourism industry. However in the *Harold Thomas James Blakeley* case the Commission said "it is not axiomatic that because the proposed venue is located in a tourist area the venue itself will be an attraction for tourists or a facility that enhances the state's tourism industry".
- 39 The applicant must present objective evidence at the appropriate level to satisfy the licensing authority of claims that the proposed liquor store will benefit the proper development of the liquor, tourism and hospitality industries of the state of Western Australia.
- 40 Letters or statements of support of a general nature from business people purporting to speak on behalf of consumers are insufficient evidence that the general public has a requirement for liquor and related services in the manner proposed by the object 5(1)(c) of the Act. (*Busswater Pty Ltd (supra)*).
- 41 The licensing authority is not obliged to determine what evidence an applicant should ultimately submit in order to discharge its obligation under section 38(2) of the Act. (*Harold Thomas James Blakeley (supra)*).
- 42 With regard to the application, the applicant did not provide evidence that it would stock boutique wine and beer from international, national and other local producers nor is there objective evidence of market research, surveys and petitions to establish the consumer requirements of liquor and related services in the locality that would support the application.

Determination

- 43 The Commission is bound by the principle established in *Hancock v Executive Director Public Health [2008] WASC 224* that in conducting a review under section 25 of the Act it is not constrained by a finding of error by the Director but is to undertake a full review of the materials before the Director and make its own determination based on that review.
- 44 By operation of section 33(1) of the Act the Commission has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was considered by Malcom CJ in *Palace Securities Pty Ltd and Another v Director Liquor Licensing (1991) 7 WAR 241* who said it was confined by the scope and subject of the Act and was not arbitrary and unlimited.

- 45 The Director has identified the materials that were before him when making his decision and provided these materials to the Commission as required by the principle set out in *Kapinkoff Nominees Pty Ltd* (*supra*) and section 25(2c) of the Act .
- 46 In respect of section 25(2c) of the Act and the issue raised by the applicant at paragraph 17 above, this type of issue was considered by Hall J. in *Kapinkoff Nominees Pty Ltd* (*supra*) who said "... a distinction between wholly new material and material that was an 'expansion' on what had been put before the Director...may not always be sound." In the subject case two of the three letters are identical to the letters considered by the Director except that a final paragraph has been added to indicate the writers would purchase liquor from the proposed outlet.
- 47 These letters were to rebut comments made by the Director in his decision and cannot be considered in the review because it is introducing material that the Director did not have before him. Moreover the letters are implicitly countering the Director's decision which takes the application outside the scope of this review.
- 48 An examination of the application and supportive submissions reveals that a substantial part of the evidence is based on opinions and unproven assertions. There are several letters of support for the grant of the licence and these go some way to reflect the requirements of consumers, however, the Commission must balance this with the customer catchment survey provided by the objectors and referred to in paragraphs 26 and 27 above.
- 49 Similarly in respect of the nine features of the proposed liquor store referred to in paragraph 10 above, there is very little evidence to support a consumer requirement for those aspects that might be regarded as additional to, or above, what is currently available to consumers.
- 50 Fourteen (14) objections were lodged pursuant to section 73(4) of the Act. Thirteen (13) of these objections had accompanying statutory declarations. The grounds for objection are set out at section 74(1) of the Act.
- 51 Whilst seven of the thirteen objections lodged on behalf of the objectors by Lavan Legal were ruled by the Director as not having established their validity as required by section 73(10) of the Act, they have all been considered by the Commission. By operation of sections 3(1) ("party to proceedings") and 25(6)(a) of the Act, a person who lodged an objection to the application and has not withdrawn it, is a party to the proceedings in the application.
- 52 The weighting applied to these objections is a matter to be determined by the Commission – refer paragraph 55 below.
- 53 For the purposes of the review the objection lodged by the Cowaramup District Social Club has not been considered, as it is not made out in accordance with section 74 of the Act.

- 54 An analysis of the remaining 13 objections and in particular the reasons for objecting, indicates that the objectors are primarily driven by business and/or anti-competitive motives. Whilst other reasons were advanced (as per table 2, page 6 of Outline of Objectors' Submissions dated 19 July 2011 for a summary) these further reasons were primarily based on opinions and not supported by evidence.
- 55 Cowaramup currently has three liquor outlets (the MRRWC; Settlers Ridge Cellar Door and Cowaramup District Social Club). Most of the objectors were very supportive of the MRRWC which by all accounts is a high quality liquor store. However given the changes to the Act in 2006, objectors can no longer argue about the competitive impact on another outlet. The burden of establishing the validity of any objection lies on the objector (section 73(10)). Whilst the objectors produced some useful material it is the Commission's view that the objectors did not fully discharge this burden, with the result that little weight has been applied to this evidence.
- 56 Pursuant to section 38(2) of the Act the onus is on the applicant to satisfy the Commission that the application is in the public interest. Section 38(4) sets out the matters the licensing authority may have regard to in determining whether granting an application is in the public interest. The concept of public interest has been extensively litigated and the Commission takes notice of and applies the following principles from various case laws:
- It is of wide import and is not exclusively defined by the Act;
 - Its proper meaning is taken from the subject matter and the legislative framework;
 - It imports a value judgment confined to the subject matter and the scope and purpose of the Act;
 - It is a balancing exercise between the private interests of the individual and the public good;
 - It is for the decision maker to determine what is relevant and what weight is given to relevant matters;
 - The Commission shall have regard to the objects of the Act.
- 57 All parties to this hearing acknowledged the importance of the object at section 5(1)(c) of the Act which is :
- 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*
- 58 In making its decision the Commission has had regard to the requirement of consumers. The contest between the applicant and the objectors in this regard raises the issue of how the Commission treats existing liquor outlets. Whilst the Commission does not consider an application in isolation from existing liquor outlets because of the various objects of the Act such as harm minimisation, the requirements of consumers and other public interest issues, what the Commission cannot do is to take into account the competitive impact that a new outlet would have on the existing outlets.

- 59 By operation of section 19 of the *Interpretation Act 1984* the Commission has also had regard to the second reading speech of the *Liquor and Gaming Legislation Amendment Act 2006* (see Parliamentary Debates, WA Parliament, vol 409, p 6342) The Hon Minister 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

- 60 This requires the Commission to take into account the positive and negative aspects in assessing an application. Whilst there is very little evidence to indicate that there are negative aspects to the application the applicant has not demonstrated positive aspects or outcomes in a convincing way.
- 61 The Commission takes note of the principles submitted by the Intervener in paragraphs 33 to 41 above and applies them in this application, in particular to the PIA and the features outlined in paragraph 10 above. Therefore in the exercise of its discretion and weighing and balancing all of the points made by the parties, the Commission has determined that the applicant has not satisfied it, on a balance of probabilities, that the granting of the application is in the public interest.
- 62 Accordingly, it is the Commission's determination that the decision of the Director is affirmed and the application is refused.
- 63 At the hearing the applicant requested the Commission to exercise its discretion in waiving the prohibition imposed under section 38(5) of the Act. The provisions of section 38(5) of the Act are clear in that if the licensing authority is not satisfied that granting the application is in public interest, an application for the grant or removal of a licence in respect of the same premises or land cannot be made within three years after the licensing authority's decision unless the Director certifies that the proposed application is of a kind sufficiently different from the application that was not granted. Accordingly it is the Commission's view that it has no discretion to waive the three year period disallowing a further application in respect of the same premises or land pursuant to section 38(5) of the Act.



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