

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

- Applicant:** Topsouth Holdings Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack Lawyers)
- Intervener:** Director of Liquor Licensing
(represented by Mr Sam Nunn of State Solicitor's Office)
- Objectors:** Ms Florence Betty Peaker
Mr Peter D Webb and Associates
Kinsel Pty Ltd
Woodlands Wines
Ms Heather Watson and Mr David Watson
Newport Securities Pty Ltd
Mr Graham Ernest Hutton and Ms Merilyn Ann Hutton
Mr William Roy Meiklejohn
Dr Michael Peterkin
- Observers:** Mr Stephen Palmer
Mrs Helen Palmer
Mr David Chaplin
- Commission:** Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Mr Greg Joyce (Member)
- Matter:** Application for review of decision A218313 of the Delegate of Director of Liquor Licensing pursuant to section 25 of the *Liquor Control Act 1988*.
- Premises:** Champagne House, 4019 Caves Road, Wilyabrup
- Date of Hearing:** 29 August 2011
- Date of Determination:** 2 November 2011
- Determination:** The application is refused

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345*
- *Palace Securities Pty Ltd v Director of Liquor Licensing (1991) 7 WAR 241*
- *Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258*
- *Executive Director of Public Health v Lily Creek International Pty Ltd [2001] WASCA 410*

Background

- 1 On 19 July 2010 an application together with a Public Interest Assessment (“the PIA”) was lodged by the Applicant for the conditional grant of a Special Facility Licence pursuant to sections 46 and 62 of the *Liquor Control Act 1988* (“the Act”) for premises known as Champagne House (“the premises”) situated at 4019 Caves Road, Wilyabrup.
- 2 By correspondence dated 15 September 2010 the Acting Deputy Director of Liquor Licensing advised the Applicant that given the proposed use of liquor, the application in its current form may be contrary to the Act and the Applicant was given 21 days to amend the application to a hotel licence under section 41 of the Act.
- 3 On 5 October 2010 the Applicant lodged an application together with a PIA, for a conditional grant of a hotel licence pursuant to sections 41 and 62 of the Act for the premises.
- 4 By correspondence dated 18 February 2011, the Department of Racing, Gaming and Liquor (“the Department”) advised the Applicant: *“You may wish to give consideration to section 5 and recent precedent decisions of the Liquor Commission, where it was determined that the PIA must be supported by objective evidence. The Commission has found that assumptions, opinions, speculation and generalised statements alone will not demonstrate that the application is in the public interest. In this respect you may wish to consider providing sufficient supporting evidence that is objective, accurate and relevant to your application to support the claims made in your PIA. Objective evidence could include marketing research findings; a feasibility study; target market survey or letters of support. Ultimately, what objective evidence is provided in support of the application is a matter for the applicant to consider”*.
- 5 Eleven objections were lodged in accordance with section 73(4) of the Act. The Delegate of the Director of Liquor Licensing (“the Director”) in her decision A218313 (“the decision”) dated 2 May 2011 determined that none of the objectors had established the validity of their objections pursuant to section 74 (10) of the Act. However for the purposes of this hearing and by operation of sections 3(1) 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 proceeding on the application. Accordingly all of the objectors have been included in this review. The Liquor Commission (“the Commission”) notes that one of the objectors, Newport Securities Pty Ltd, has gone into receivership and also notes the correspondence of the Applicant in respect of this issue.
- 6 The Director refused the application on the basis that the Applicant had not satisfied her that it was in the public interest to grant the licence.
- 7 A review application was lodged with the Commission on 6 May 2011, pursuant to section 25 of the Act.

- 8 On 20 May 2011 the Director gave notice of his intervention pursuant to section 69(11) of the Act.
- 9 A hearing of the matter was held before the Commission on 29 August 2011.

Submissions by the Applicant

- 10 Greenvale Enterprises Pty Ltd, the registered proprietor of the premises, has held a producer's licence at the premises since August 2002. With the construction of new premises in 2009, the producer's licence was redefined and the Department approved both onsite and takeaway sales of wines produced by Greenvale Enterprises Pty Ltd (marketed as Palmer wines). However, the Applicant submits that in order to attract and service the demands of tourists to the proposed hotel resort, a broader licence is required.
- 11 The property consists of 13.5 hectares of land on Caves Road, Wilyabrup and is zoned "Viticulture and Tourism" under the District Town Planning Scheme of the Shire of Busselton. Existing facilities include a 170 seat function centre, restaurant and bar, together with covered verandas with a capacity to hold 100 people. There is an amphitheatre, with a capacity to hold 400 people and two villa units. A further nine villa units will be constructed this year providing for a total of 43 suites accommodating 86 guests. The complex has approval for 85 short stay tourist accommodation villas. Additionally the site is cultivated as a vineyard with 30 year old vines producing gold medal award winning wines.
- 12 The project is the result of extensive consultation with the Department of Local Government and a section 40 certificate has been provided by the Shire of Busselton stating that the premises will comply with all relevant planning laws.
- 13 The Applicant provided several letters of support from a number of entities including Sky West, the Mantra Group (the proposed hotel chain), TMG (Events management Group), Sandalford Wines, Busselton Chamber of Commerce and Industry, Geographe Bay Tourism Association, Shire of Busselton and Flutes Restaurant. Each of these letters provides specific support for the hotel resort and represents a wide range of experience in the tourism industry.
- 14 It is proposed the Mantra Group will provide a world class 4.5 star boutique hotel resort, attracting tourists through the international Peppers brand. The Applicant has entered into a contract with the Mantra Group to establish this facility.
- 15 The Applicant states that based on current booking demand for other catering organisations in the region the proposed hotel resort should provide gross revenue inflow into the region of \$1.5 million per annum through the use of the function centre and, based on an occupancy rate of 50% of the additional villa units, a further \$3 million gross income per annum. It is envisaged this will provide employment for 8 permanent employees and 29 casual positions.

- 16 The Applicant seeks authority to sell all forms of liquor for consumption on and off the premises. It is proposed that the restaurant and bar will open daily from 10am to 6pm Monday to Friday and 10am to 12am on Sundays. At the hearing the Applicant indicated it was seeking the statutory hours of trading for a hotel.
- 17 The Applicant has responded to the various points made by the objectors in detail as follows:
- Since the granting of the producer's licence the sale of wine from the premises has been available by appointment. With the construction of new premises in 2009 the premises was open to the public periodically during tourist holiday periods and in January and February 2011 was opened daily from 10am to 5pm.
 - The Shire of Busselton has approved the development pursuant to the existing zoning and has provided a section 40 certificate in respect of the proposed hotel use.
 - The initial application was for a special facilities licence, however the Applicant was advised by the Department to apply for a hotel licence.
 - It is not the intention of the Applicant to operate a conventional hotel/tavern facility and in any event this would be inconsistent with the development approval of the Shire of Busselton.
 - In respect of the perceived danger at the entrance of the premises off Caves Road, the Department of Main Roads has approved the entry, which has the specified sight lines and deceleration lines. A wide entry road has also been provided to provide excellent vision in both directions for motorists.
 - It is the intention of the Applicant to provide a resort shuttle bus service for guests to and from the airport and nearby towns.
 - There will be no adverse impact on the amenity of the locality. The Applicant has sound management skills and the nearest business is 500 metres away. The nearest residence is over 1.5 kilometres away.
 - The proposed hotel resort will not cause undue noise and disturbance. This is a 4.5 star hotel which will be properly managed. Whilst the premises will have a capacity for 670 people it is not practical that there would ever be this number of people present at one time.

Submissions by the Intervener

- 18 The onus is on the Applicant pursuant to section 38(2) of the Act to satisfy the Commission that granting the application is in the public interest. To discharge its onus the Applicant must address the positive and negative impacts that the grant will have on the local community.

- 19 The private interests of an applicant wishing to establish a liquor outlet in a particular locality 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.
- 20 Section 5(1)(c) of the Act provides that regard must be had to the requirements of the consumer for liquor and related services. The Applicant must present objective evidence at an appropriate level to satisfy the Commission. The Commission has previously considered that it is not sufficient for an applicant to merely express opinions and make assertions about perceived benefits of an application. Such opinions and assertions must be supported by an appropriate level of evidence. The Intervener cited the following Commission cases in support of this view:
- *Busswater Pty Ltd v Mr KV House and Mrs L V Verhoog (LC 17/2010) at [36]*
 - *Element WA Pty Ltd v Director Liquor Licensing (LC 32/2010) at [23]*
 - *Harold Thomas James Blakely v Director Liquor Licensing (LC 44/2010) at [39]*
 - *Shallcross Investments Pty Ltd v Director Liquor Licensing (LC 26/2010) at [18]*
- 21 The Applicant did not provide submissions from tourists, consumers or locals in the region to show that the proposed development would meet a requirement for liquor and related services. Nor were market surveys or petitions provided to support the Applicant's assertions.

Submissions by the Objectors

- 22 The eleven objectors all stated that the proposed development was not in the public interest. The objectors points can be summarised as follows:
- No wine has been sold from the premises to the public under the existing licence and there is no evidence that there is public demand for the proposal.
 - The entry to the premises is particularly hazardous, as it is located on Caves Road, which has a high number of fatalities. On the information provided up to 670 people could attend the premises which will increase the risk of alcohol related harm. The Road Safety Council's 2006 Report identifies significant statistics for road crashes and fatalities for the South West region. Wilyabrup is isolated from emergency services.
 - Undue alcohol related harm is already high in the South West. Rates of alcohol related hospitalisation are 1.53 times higher than the State rates.
 - There is no public transport available in the locality.
 - The proposed use is likely to be inconsistent with the existing zoning.
 - The Shire of Busselton has not contemplated a hotel when considering the development application.
 - The grant of the application would cause undue noise and disturbance. The Applicant has not produced any evidence that the premises will be properly managed.

- The amenity, quiet or good order of the locality would be lessened if the licence were granted because a hotel resort is being developed in a traditional farming and viticulture area.
- Wilyabrup is recognised for its world class wines. A hotel selling all kinds of liquor will undermine the work done to establish the authenticity of the region.
- The grant is inconsistent with the objects of the Act.

Determination

- 23 The Commission is bound by the principle established in *Hancock v Executive Director of 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.
- 24 The Director has identified the materials that were before her when making her decision and has provided these materials to the Commission as required by the principle set out in *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345* and section 25(2)(c) of the Act.
- 25 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) provides an inclusive definition of the public interest and it is an area of law that has been comprehensively litigated and the Commission takes notice of and applies the following principles from the case law:
- It is of wide import and is not exclusively defined by the Act;
 - The proper meaning is taken from the subject matter and the legislative framework;
 - It imports a value judgment confined by the subject matter and the scope and purpose of the Act;
 - It is a balancing and weighing exercise between the private interests of the individual and the public good; and
 - It is for the decision maker to determine what is relevant and what weight is given to these matters.
- 26 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 Malcolm CJ in *Palace Securities Pty Ltd v Director of Liquor Licensing (1991) 7 WAR 241* who said it was confined to the scope and subject of the Act and was not arbitrary or unlimited.
- 27 Section 5(2) of the Act requires the Commission to have regard to both the primary and secondary objects in carrying out its functions under the Act. In particular section 5(1)(c) provides:
- 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.*

28 The Commission has held in previous matters, as pointed out by the Intervener in paragraph 20 above, that an Applicant must present supporting evidence at the appropriate level to satisfy the Commission that there is a real and demonstrable consumer requirement to justify the granting of the licence. The Department advised the Applicant of this requirement (see paragraph 4 above) as part of the preparatory process and sought further evidence. The Applicant chose not to do so.

29 At the hearing, counsel for the Applicant went through the 8 letters of support provided by the Applicant. Whilst the Commission acknowledges the substance of these letters and the experience of the people who wrote them, it is not sufficient to discharge the onus on the Applicant under section 38(2). Information that would be probative to the Commission includes market surveys, petitions of substance and information that demonstrates a real consumer requirement.

30 The Executive Director of Public Health (“EDPH”) intervened in the proceedings before the Director. Accordingly the matters raised by the EDPH concerning harm or ill-health are properly before the Commission and to be taken into account in the balancing exercise.

31 The EDPH raised concerns about harm or ill-health associated with the application including:

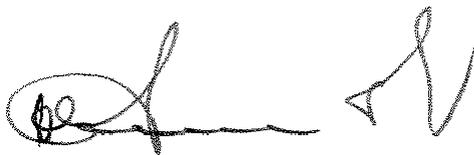
- The number of existing licences in the locality;
- Increasing outlet density is associated with increased levels of alcohol related harm;
- Drink driving and road trauma concerns.

As a consequence the EDPH recommended a range of conditions be imposed on the licence if it were granted.

32 The principles for assessing harm or ill-health have been set down in *Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258* and *Executive Director of Public Health v Lily Creek International Pty Ltd [2001] WASCA 410* and include:

- Conflict may arise when assessing the object of minimising harm or ill-health due to the use of liquor and other objects contained in section 5 of the Act. When conflict arises the Commission must undertake a weighing and balancing exercise.
- It is significant that the primary object is to “minimise” harm or ill-health not to prevent it absolutely.
- Harm or ill-health is essentially predictive but it does not follow that even the possibility of harm or ill-health is to be ignored.
- The mere possibility of harm or ill-health will always be a relevant matter for the Commission when discharging its functions.

- 33 On the basis of evidence presented before the Commission, it is the Commission's view that the proposed functions at the premises will not sufficiently increase the consumption of liquor such that harm or ill health will be an issue.
- 34 The Commission has carefully considered the submissions of all eleven objectors. The objectors have the burden of establishing the validity of their objections to the Commission (section 73(10)). Several of the views put forward are not supported by sufficient evidence; other views are opinions of the objectors. However several of the issues raised have been taken into account by the Commission in assessing the public interest. However in view of the lack of supporting evidence little weight was accorded to the objections.
- 35 In the material before the Commission, the relationship between the Applicant and the Mantra group was unclear. The Applicant was described as the "operator" whereas the Mantra Group indicated it would "manage" the hotel resort. At the hearing the Applicant stated that the Applicant was the body that would carry on the business if the licence were granted. This is an important consideration given the requirement of section 68(2a) of the Act.
- 36 The Commission is mindful of the potential for development of tourism in the area already enjoying a reputation as a significant tourist destination in WA and thus meeting the requirements of section 5(1)(a) of the Act. However the Commission notes that the applicant in spite of being specifically advised by the Director of the requirements of section 38(2) and given further opportunity to rectify any defects in the original PIA elected to not do so and has therefore fallen well short of the requirements of section 38(2). The application is therefore refused.



JIM FREEMANTLE
CHAIRPERSON