[2002] WASCA 108

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	EXECUTIVE DIRECTOR, PUBLIC HEALTH & ANOR -v- WOOLWORTHS LTD & ORS [2002] WASCA 108
CORAM	**:**	WALLWORK J STEYTLER J WHEELER J
HEARD	**:**	18 FEBRUARY 2002
DELIVERED	**:**	3 MAY 2002
FILE NO/S	**:**	FUL 86 of 2001
MATTER	**:**	an Appeal from the Liquor Licensing Court of Western Australia
BETWEEN	**:**	EXECUTIVE DIRECTOR, PUBLIC HEALTH First Appellant (Intervener) DIRECTOR OF LIQUOR LICENSING Second Appellant (Intervener) AND WOOLWORTHS LTD First Respondent (Applicant) GEOFFREY BRUCE STANLEY ROSEGATE HOLDINGS PTY LTD HELEN BIRD PETER FRANCIS PLANK JAMES NAERA TONY SMITH AUSTRALIAN LIQUOR GROUP LTD ALLAN DINNEEN

WESTERN AUSTRALIAN HOSPITALITY & HOTELS ASSOCIATION (INC)
Second Respondents (Objectors)

FILE NO/S : FUL 87 of 2001

MATTER : an Appeal from the Liquor Licensing Court of Western Australia

BETWEEN : LIQUORLAND (AUSTRALIA) PTY LTD (t/as LIQUORLAND SWANVIEW)
AUSTRALIAN LIQUOR GROUP LTD (t/as KNOX LIQUOR CENTRE, KNOX PLACE CENTREPOINT MIDLAND, KNOX PLACE GREAT EASTERN HIGHWAY MIDLAND)
(t/as KNOX LIQUOR CENTRE, KNOX PLACE CEN TREPOINT MIDLAND, KNOX PLACE GREAT EASTERN HIGHWAY MIDLAND)
Appellants (Objectors)

AND

WOOLWORTHS LTD
Respondent (Applicant)

Catchwords:

Liquor licensing - Alteration or redefinition of licensed premises - Proposed new bottle shop - Some distance from existing licensed premises - Whether an alteration or redefinition of licensed premises requires physical or functional unity of the premises

Legislation:

Liquor Licensing Act 1988 (WA), s 5, s 6, s 28, s 77

Result:

Appeal allowed
The Order of Liquor Licensing Court granting the application be set aside and the application be dismissed

Category: A

Representation:

FUL 86 of 2001

Counsel:

First Appellant (Intervener)	:	Mr R M Mitchell
Second Appellant (Intervener)	:	Mr R M Mitchell
First Respondent (Applicant)	:	Mr G D Crocket
Second Respondents (Objectors)	:	No appearance

Solicitors:

First Appellant (Intervener)	:	State Crown Solicitor
Second Appellant (Intervener)	:	State Crown Solicitor
First Respondent (Applicant)	:	G C Crocket & Co
Second Respondents (Objectors)	:	No appearance

FUL 87 of 2001

Counsel:

Appellants (Objectors)	:	Mr P D Evans
Respondent (Applicant)	:	Mr G D Crocket

Solicitors:

Appellants (Objectors)	:	Freehills
Respondent (Applicant)	:	G D Crocket & Co

Case(s) referred to in judgment(s):

Executive Director of Public Health v Lily Creek International Pty Ltd & Ors (2000) 22 WAR 510
Liquorland Australia Pty Ltd v Hawkins (1996) 16 WAR 325
Minister for Aboriginal Affairs v Pico-Wallsend Ltd (1986) 162 CLR 24
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
Tapp & Tapp v ALH Group Pty Ltd & Anor [2000] 76 SASR 397

Case(s) also cited:

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1
Downes Family Trust & Ors v Woolworths (WA) Pty Ltd [2001] WASCA 382
Executive Director of Public Health v Lily Creek International Pty Ltd & Ors [2001] WASCA 410
Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd & Ors, unreported; SCt of WA; Library No 940563; 12 October 1994
Jericho Nominees Pty Ltd v Dileum (1992) 6 WAR 380
Laveson Pty Ltd v Prosser Automotive Engineers Pty Ltd [1999] WASCA 285
Liquor Stores Association v Angas Park Hotel Pty Ltd [1999] 74 SASR 187
Liquorland (Australia) Pty Ltd & Ors v Austie Nominees Pty Ltd (1999) 20 WAR 405
Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors, unreported; FCt SCt of WA; Library No 950287; 8 June 1995
R v District Court, Ex parte White (1966) 116 CLR 644
Re Austotel Management Pty Ltd (Morley Park Hotel) (1991) 8 SR(WA) 65
Trensilk Holdings Pty Ltd v Ettamogah Pub (Morley) Pty Ltd [2000] WASCA 254
Waterford v The Commonwealth (1987) 163 CLR 54
Western Australian Greyhound Racing Association (Cannington Raceway) (No 1) 1991 9 SR(WA) 232
Williams v The Queen (1986) 161 CLR 278

1 **WALLWORK J**: The two appellants appeal against a decision of the Judge of the Liquor Licensing Court granting an application by the Respondent to alter or redefine premises which are licensed under a Liquor Store Licence. The licensed premises are situated in Shop 15 at the Centrepoint Shopping Centre on the corner of Helena Street and Great Eastern Highway, Midland.

2 The application to alter or redefine the licensed premises was in effect an application to build a separate "drive through purchase facility" approximately 100 yards from, and in a different building to, the existing licensed premises which are in the shopping centre.

3 Section 77 of the *Liquor Licensing Act 1988 (WA)*, so far as it is relevant to this application, provides that on an application being made by the owner or occupier of licensed premises, or by the licensee with the consent of the owner and any lessor, the licensing authority may approve a proposed alteration of licensed premises or, in certain circumstances, the redefinition of the licensed premises as defined in the licence.

4 The appellants contend that the proposed new building, which will not be physically connected to the present licensed premises which are proposed to be altered or redefined, and some distance away from the present licensed premises, cannot come within the words "a proposed alteration" or "the redefinition" of the licensed premises within the meaning of the words in s 77 of the Act. The appellants contend that such a new facility would constitute separate licensed premises and that the learned Licensing Court Judge erred in law in deciding that he had the jurisdiction to grant the application.

5 In ***Tapp & Tapp v ALH Group Pty Ltd & Anor*** [2000] 76 SASR 397 the facts were nearly the reverse of those in the present application. The ***Tapp*** case concerned a hotel licence. The licensee wished to redefine the licensed premises to include within them a separate walk-in bottle shop in a nearby shopping centre. The distance from the proposed retail shop to the nearest land boundary of the licensed premises was some 70 metres. Most of that distance could be traversed through a covered walkway. Standing in a direct line between the proposed retail liquor shop and the licensed premises was a large supermarket forming part of the shopping centre. The Licensing Court Judge granted the application for redefinition of the hotel premises to include the proposed retail liquor store. On appeal it was contended that the liquor store premises, not being contiguous, were not sufficiently close to constitute a legitimate

redefinition of the licensed premises. The relevant section to the Act was similar to s 77 of the WA Act.

6 On the appeal, Bleby J with whom Doyle CJ and Debelle J agreed, when discussing the word "premises" said at 400:

> "The dictionary definition does not necessarily require common ownership but it does require an identifiable connection between the several components of the premises. Usually that will be a connection of a physical or visible type. If premises are on separately owned pieces of land, they will usually be on adjoining or contiguous land. To come within the commonly understood definition they require some physical or functional unity or integrity. If there is some substantial permanent physical barrier or fence separating two buildings or groups of buildings, or if buildings are used for quite different purposes, even though the land is contiguous, they may well not be described as comprising the same premises, even where the land may be in common ownership."

7 The definition of "premises" in the WA Act does not answer the question raised in this case. The definition of "premises" relevantly includes:

> "(a) land;
>
> (b) a vehicle; or
>
> (c) a part of premises."

8 The definition of "premises" in the South Australian Act which was relevant in the ***Tapp*** decision was much the same as the one in the Western Australian Act. Bleby J said that the South Australian definition did not include the ordinary definition of "premises". His Honour said that in South Australia it was possible for licensed premises to be a part of larger premises and not occupy the whole of the particular set of premises. That was because, for the purposes of the Act, it was necessary to delineate the area or areas within which sales of liquor may take place. His Honour said it followed that licensed premises or "premises in respect of which a licence is in force", "may include a part of premises in respect of which a licence is in force, there being other parts of the same premises in respect of which there is no licence in force. The licensed premises will still form part of the same premises if, within the boundary of the

premises of which they form part, the boundary of the licensed premises are moved, adjusted or extended."

9 In my view the position is similar under the West Australian *Liquor Licensing Act 1988*.

10 Bleby J also noted that the second important relevant feature of the South Australian Act was that a liquor licence is granted for only one set of premises. It is the same in this State. Further, that if a business is to be transferred to other premises, the licence must be removed to those premises. It is the same under our Act.

11 His Honour said at 401:

> "It follows from what I have said that the proper interpretation of section 68 [similar to WA s 77] requires that any alteration or redefinition of licensed premises can only be approved by the licensing authority if that alteration or redefinition is in respect of the same premises. In other words, the redefined premises must be, or form part of, the same identifiable premises in respect of which the licence is granted. The premises may be redefined by extension, by contraction, by re-arrangement or by addition of a new building, so long as the physical features remain part of the same premises and are not different or separate premises. An acceptable redefinition could include any new building or structure within the grounds or other appurtenances of the existing licensed premises, provided that all components together can still be regarded as the one premises. The buildings concerned need not necessarily be under or connected by the same roof. It is not necessary that the buildings should be on the same title, provided that they retain a physical and functional integrity, and can properly be regarded as the same premises." [my words in brackets]

12 At 402 His Honour concluded:

> "There is nothing to prevent a redefinition application being successfully brought in respect of what, prior to the application, are separate premises. What is not clearly stated by the majority in the *Angas Park Hotel* case [1999] 74 SASR 187, what I believe the Act requires, and what this Court should now make clear, is that the resultant combination, however it is effected, can properly be regarded as comprising the same premises in its ordinary meaning and in the sense which I have

> discussed. Those premises must also constitute an extension or redefinition of the original licensed premises. Closeness of the components to each other, whether they are adjacent or contiguous, or whether they appear to constitute one place of business will be important but not exclusive indicators of whether the new components comprise the same premises. Other factors may also be important."

13 In the ***Tapp*** decision the appeal was allowed on the basis that the hotel in that case together with the proposed bottle shop premises could not on any view be regarded as comprising the same premises. Bleby J said:

> "The two areas are physically separated by other buildings. The proposed components plainly lack that degree of integrity such that one could describe them as comprising the same premises. To grant the application would be tantamount to granting a fresh licence in respect of new premises for the proposed bottle shop without the licensing authority having to consider the many other factors required to be considered on the granting of such a licence…"

14 In my opinion the above remarks of Bleby J are directly applicable to this case and this appeal should succeed for the same reasons as in the ***Tapp*** decision.

15 The proposed new bottle shop as a matter of commonsense and ordinary language, is clearly a separate premises from the bottle shop within the shopping centre. The proposal is not a redefinition of any existing premises. It is the creation of a new bottle shop some distance away, without any alteration or redefinition of the existing premises. As counsel for the appellants submitted, the proposal is in no way the altering of the existing premises by them being expanded or contracted. The new bottle shop is not part of the same licensed premises. It could not be an alteration to them or a redefinition of them. The new liquor store is proposed to be constructed approximately 100 metres away from the existing premises. Nothing is to be done to alter the existing store.

16 In my opinion, for the above reasons, ground 1 of the amended notice of appeal should be upheld. Grounds 2 and 3 are variations of ground 1 and need not be discussed.

17 The appellants appealed on another ground which is contained in grounds 4 and 5 of the amended grounds of appeal. That ground is that

the learned Judge "failed to properly weigh the primary object of alcohol related harm minimisation" contained in s 5(1) of the Act with the subsidiary objects contained in s 5(2) of the Act.

18 The objects of the Act are stated in s 5. It is provided that one of the primary objects of the Act is to minimise harm or ill health caused to people, or any group of people, due to the use of liquor - s 5(1)(b). Section 5(2) provides that in carrying out its functions under the Act, the licensing authority is to have regard to the primary objects of the Act, one of which is contained in s 5(1)(b), and which is to minimise harm or ill health caused to people or any group of people due to the use of liquor.

19 It was submitted for the appellants that the learned Judge had firstly wrongly categorised the level of harm or ill health as a mere possibility, when that finding had not been open on the evidence. It was also contended that the Judge had then compounded that alleged error by not correctly balancing the relevant matters when he had said in effect, that because there was only a mere possibility of harm, that of itself was not a sufficient reason not to grant the application.

20 It was submitted that the learned Judge should have identified the factors which counted in favour of the grant of the licence from the point of view of the subsidiary objects of the Act and then balanced them against the level of risk identified, which he was required to consider as a primary object of the Act. It was submitted that what had happened was that the Judge had characterised the evidence as leading to no more than a mere possibility of harm. Having reached that conclusion he had in effect said that he did not need to consider the matter any further.

21 It was submitted that when the evidence was looked at as a whole it had not been open to the learned Judge to find that there would be no more than a mere possibility of harm or ill health to any group or groups of people if the application was approved. Amongst other things, counsel relied on the words of Murray J in ***Liquorland Australia Pty Ltd v Hawkins*** (1996) 16 WAR 325 at 329 where his Honour said:

> "It is legitimate … to challenge a finding of fact or conclusion as to the facts upon the ground that it was not open on the evidence because no reasonable person properly instructing himself as to the law could reach the conclusion impugned."

22 Murray J cited a number of authorities for that proposition including ***Palace Securities Pty Ltd v Director of Liquor Licensing*** (1992) 7 WAR 241 at 251-252.

23 It was submitted for the appellants that unreasonableness in that sense would amount to an error of law for the purposes of s 28 of the *Liquor Licensing Act 1988 (WA)*. *cf* ***Minister for Aboriginal Affairs v Pico-Wallsend Ltd*** (1986) 162 CLR 24.

24 Evidence had been given that because the proposed new bottle shop was to be located outside the shopping centre, it would not be confined to the shopping centre's trading hours and it could stay open longer than the liquor store in the shopping centre.

25 Counsel for the appellants referred to the evidence of Professor Stockwell who is the Director of the National Drug Research Institute. Prior to July 1998 the Institute was known as the National Centre for Research into the Prevention of Drug Abuse. Professor Stockwell's qualifications were not challenged.

26 Professor Stockwell had given evidence that at the present time a "drinking population" of relevance to this application drink in the nearby Tuohy Gardens. He said that those persons would be drinking at a place which was extremely close to the proposed new liquor store. They would be able to purchase more alcohol, if permitted to do so, over a longer period of time than at present and to continue drinking nearby. Professor Stockwell said:

> "If the pattern reliably observed with additional night time hours in hotels is followed, as described above (Chikritzhs and Al 1997) it would be expected that sales would increase and so would alcohol related violence in the vicinity."

27 The professor said that secondly, there are already six premises in the neighbourhood with licences to sell packaged liquor. It had been stated by the police officers that local efforts to refuse service to intoxicated customers had recently improved the problem, although it clearly remained. Professor Stockwell said:

> "A new and convenient liquor store would, according to the most sophisticated studies cited above, suggest that there will be an overall increase in alcohol sales in the area. Again, if this follows patterns documented elsewhere, it would be highly likely to result in increased local rates of violence and alcohol related road trauma. A possible mechanism, over and above that of additional convenience, especially for those who drink nearby, is the pressure of increased competition between local liquor stores. This will increase pressures against refusing

> service to persons who are already intoxicated, under age, etc. While it is theoretically possible for the police to maintain an effective deterrence against such practices, other evidence suggests that it is almost impossible to maintain such vigilance around the clock with the use of uniformed police (Stockwell 1995) as is current practice. The third is the fact that Aboriginal people who drink in public are a particular focus of concern in the locality. Experience elsewhere has suggested that reductions in the availability of alcohol are a benefit to public health and safety in communities with a high proportion of Aboriginal residents. This implies that increases in physical availability will have an opposite effect. To which must be added a specific concern regarding the likelihood of the local park drinkers persistently attempting to purchase alcohol or beg from customers in the proposed drive in facility. The experience of other local businesses, including chemists and licensed premises, indicated this to be a strong possibility. In addition to the public nuisance element there is also the risk to this vulnerable group of individuals of being hit by cars, especially if trading hours extend longer into the night than is currently the case."

28 Professor Stockwell had also said that "The most sophisticated studies suggest that in the main, supply precedes the demand." There was evidence "… of demand driving supply, but the most powerful effect appears to be supply of liquor outlets and high density then stimulating further demand for alcohol in a geographic area."

29 Professor Stockwell said:

> "It's a very specific place and so any conclusion is about probabilities. It's not certainty. If it followed the rule, if this little area followed the rule of what appears to be the case in these larger studies, there is in the immediate area, as I understand it, in quite a small immediate vicinity, six outlets licensed to sell packaged liquor. This would add a seventh which I would imagine would be quite a visible and substantial addition, so it would be locally quite significant in terms of the convenience for some people. I suppose it would also - for many people who are just coming to visit the shopping centre, …and wouldn't be driving around other places or necessarily looking for liquor, it would be much more convenient. It would occur to them to purchase alcohol because it would be very easy

> just to drive in on their way in, or way out of, Centrepoint and they might make decisions to purchase liquor in a way they wouldn't otherwise. They may go and consume it - they will often consume it somewhere else entirely, but in terms of the amount of alcohol sold in that area, some of which would be consumed at the locality, that would certainly increase. They'd get a slice of the local market but it would undoubtedly increase that overall local alcohol market in terms of the amount of alcohol sold."

30 With respect to violence resulting from the extension of the closing hours Professor Stockwell said:

> "So I would say it's a particularly relevant consideration; that we know public order incidents involving violence that occur late in the evening after sunset are more likely to involve prior alcohol consumption."

31 The professor said that because the proposed new bottle shop would increase competition and reduce prices, and increase economic and physical availability, he thought it was possible for the situation to become worse, even though it was bad at the present time.

32 In cross-examination it was put to Professor Stockwell that there were already six outlets which persons in the area could go to. The professor said:

> "It's still my view that it is a significant change. There's a number of complex issues to take into account; the pressures on those six operators to serve alcohol responsibly at the moment and the ability of the local police to monitor the situation. So I think those are factors that I would say were important."

33 It was then put "Yes, important, but we don't know. We just don't know?" The professor answered:

> "No, we can only say on the balance of probabilities that it's likely. That is my opinion."

34 Further on in his evidence Professor Stockwell was asked a question by the learned Judge and he said:

> "What led me to suspect that this would not be a good idea was the evidence that there were existing problems in the immediate

> vicinity. Then if I'm asked to strictly apply what appears to be the case in the international literature, it would appear on the balance of probabilities that some other general issues will apply as well, about increased economic availability and so on."

35 Counsel for the appellants also relied on the evidence of a police officer who gave evidence that there was a focal area surrounding Tuohy Gardens with an access along The Crescent in Midland which boarders Tuohy Gardens, where trouble occurred. He said:

> "… generally alcohol is involved and generally on the outskirts of the gathering you have got other abuse as well, but predominantly its an alcohol related thing and what happens is when they meet they will consume alcohol and then that will in due course change the situation where it becomes very volatile."

36 The constable said:

> "Where I have had - where I have experienced probably the majority of call outs - this is me personally - I would say Centrepoint. I would say Centrepoint is the one where we get complaints stemming from - from there - but that's not to say that we don't get complaints stemming from the others."

37 The deputy principal of the local senior high school which was located about a kilometre away from the shopping centre also gave evidence. Amongst other things he said:

> "… and I think that if we put a facility in the middle of a car park it will make it very easy for them to get access to that particular point without the risk of mum or dad or someone actually seeing them go in there."

38 He contrasted that with the existing liquor store in the shopping centre where it would be quite easy:

> "…for mum or dad or whoever, to actually be in the Centre as they walk in or walk out, so the risk factor would be extremely high for them and they would tend to dodge around that in some way, shape or form…"

39 With respect to the students' perception of the risk of being detected with the proposed drive through bottle shop the principal said:

> "… because it's in the middle of a car park. If they go in a buy the stuff themselves then they will walk through the drive in. The risk is that a car will pull up at that precise moment that they are in the drive in purchasing, so that the risk factor related to there out in the car park versus in the middle of a busy shopping centre is quite huge as far as they are concerned though, but they would perceive that as being a very, very worthwhile risk, shall we say."

40 He said that students work very hard at assessing risks and trying not to get caught.

41 It was submitted for the appellants that the principal had said that there are a group of students within the school with an alcohol problem and that the effect of his evidence was that a new bottle shop as proposed in the area would provide them with a significant increased availability of alcohol. The principal said:

> "I believe that it's going to put our 'at risk students' at further risk. I believe that that is a fact. These students - and in fact we run a special program at Governor Stirling for students at educational risk because we recognise the students that we deal with. These sort of students will make every effort to try and get alcohol. I believe that this proposal will make it easier for them to get alcohol and exacerbate the problems that already exist in the school."

42 Counsel for the appellants submitted that the central evidence was that of Professor Stockwell and that his predictions as to what would occur, plus the evidence from the police officer and the school teacher gave a background of existing social problems in the area.

43 It was submitted it had not been open on Professor Stockwell's unchallenged evidence to conclude that what he was talking about was a mere possibility of harm. He had been talking about probable likely consequences. It was submitted that the learned Judge ought to have taken that into account.

44 The learned Judge said:

> "Upon the evidence for the applicant and the Executor Director, Public Health, I find that if this application is approved, liquor sales at the premises are likely to double."

45 His Honour further found:

> "I find that the estimated increased sales may increase competition and reduce the price of liquor products, which may increase per capita consumption of liquor amongst the vulnerable group identified by Mr Lynch."

46 His Honour then said:

> "There is however no evidence that consumption will increase above the State average for this group or any other section of the public in or beyond the affected area."

47 The appellants complained about his Honour's comment that:

> "In view of the very small numbers involved and otherwise the lack of evidence of increased per capita consumption in this affected area consequent upon the approval of this application, I find that there is no more than a mere possibility of harm or ill health to any group or groups of people if this application is approved."

48 His Honour then said:

> "These conclusions lead me to the view that the evidence as a whole does not warrant the refusal of this application in the public interests to minimise harm or ill health in accordance with the objects of the Act. Accordingly, I am of the opinion that the application should be granted."

49 It was submitted that there had not been the balancing exercise which the Court in ***Executive Director of Public Health v Lily Creek International Pty Ltd & Ors*** (2000) 22 WAR 510 had indicated was appropriate.

50 In my opinion his Honour did to "the balancing exercise" referred to by the appellants when he said:

> "I find that the estimated increased sales may increase competition and reduce the price of liquor products which may increase per capita consumption of liquor amongst the vulnerable group identified by Mr Lynch. There is, however, no evidence that consumption will increase above the State average for this group or any other section of the public in or beyond the affected area. Equally, as I pointed out earlier, there

> is no evidence that the estimated increase in sales will be to residents of the affected area, which Prof Stockwell accepted. The evidence of Mr Lynch and Mr Bolton leads me to the firm conclusion that the small section of the public Mr Lynch spoke about and the juveniles Mr Bolton spoke about will acquire packaged liquor in any event, whether this application is approved or not. In view of the very small numbers involved and otherwise the lack of evidence of increased per capita consumption in this affected area consequent upon the approval of this application, I find that there is no more than a mere possibility of harm or ill-health to any group or groups of people if this application is approved. These conclusions lead me to the view that the evidence as a whole does not warrant the refusal of this application in the public interests to minimise harm or ill-health in accordance with the objects of the Act."

51 In my opinion, his Honour's findings were open to him on all the evidence and I would not uphold grounds 4 and 5 of the amended notice of appeal.

52 It was submitted that if this Court upheld the appeal on the grounds concerned with the proposed new premises not being an alteration or redefinition of the existing licensed premises, the Court should allow the appeal, set aside the order of the Liquor Licensing Court and dismiss the application. It was contended that if the appeal is allowed on this ground, then the effect of the amendment to the Act in 2001 (which came into operation on the 7 January 2002) is that the application could not thereafter be granted; that s 77(5a) (subject to exceptions which are not relevant) would prevent another application being made under s 77 because the relevant area to be included is not contiguous with the existing licensed premises.

53 Section 6(2) of the 2001 Amendment (26 of 2001) provides:

> "An application made under s 77(4) of the *Liquor Licensing Act 1988* before the commencement of this section and not determined before then must be determined in accordance with the *Liquor Licensing Act 1988* as amended by this section."

54 In my view the appellants' contention in this regard should be upheld.

55 The orders should therefore be that the appeal is allowed, the order granting the application be set aside and the relevant application be dismissed.

56 **STEYTLER J**: I have had the advantage of reading the reasons for decision of Wallwork J and those of Wheeler J.

57 I agree with all that Wallwork J has said in relation to ground 1 of the grounds of appeal and in respect of the orders which should be made as a consequence.

58 However, like Wheeler J, and for the reasons given by her, I prefer to express no view in relation to grounds 4 and 5 of the amended notice of appeal.

59 **WHEELER J**: I agree with the views expressed by Wallwork J in relation to ground 1 of the grounds of appeal. I also agree with his Honour's conclusion as to the orders which should be made as a result.

60 As to grounds 4 and 5 of the amended notice of appeal, while the learned Judge in the Liquor Licensing Court embarked upon a "balancing" exercise, it appears to me that a number of the conclusions of fact upon which he relied in doing so are open to question. There is raised by these grounds, therefore, the very difficult question of determining when a decision maker, whose errors of fact are not open to appeal, has reached a conclusion which is so unreasonable that it amounts to an error of law. I prefer to express no view in relation to these grounds, as it is unnecessary to do so for the determination of this appeal.