

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : LIQUORLAND (AUSTRALIA) PTY LTD -v-
EXECUTIVE DIRECTOR OF PUBLIC HEALTH
[2013] WASC 51

CORAM : EDELMAN J

HEARD : 19 FEBRUARY 2013

DELIVERED : 27 FEBRUARY 2013

FILE NO/S : GDA 11 of 2012

BETWEEN : LIQUORLAND (AUSTRALIA) PTY LTD
Appellant

AND

EXECUTIVE DIRECTOR OF PUBLIC HEALTH
Respondent

ON APPEAL FROM:

Jurisdiction : THE LIQUOR COMMISSION OF WESTERN
AUSTRALIA

Coram : MR J FREEMANTLE (CHAIRPERSON)
MR S RAFFERTY (DEPUTY CHAIRPERSON) &
MS H COGAN (MEMBER)

Citation : LC 18 of 2012

Catchwords:

Appeal - Liquor licensing - Refusal by Liquor Commission of application for liquor store licence - Alleged errors of law - Whether Liquor Commission reversed onus of proof in relation to objections - Liquor Commission made no determination whether any single objection was proved - Whether absence of

evidence to support findings by Liquor Commission - Whether decision by Liquor Commission was manifestly unreasonable - Whether any consequences follow from error by Liquor Commission in describing a term as being defined by statute - Whether Liquor Commission erred by referring to one passage from the second reading speech of amending legislation

Legislation:

Administrative Decisions (Judicial Review Act 1977) (Cth)

Evidence Act 1906 (WA)

Liquor Act 1970 (WA)

Liquor Control Act 1988 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr S Standing

Respondent : Mr D E Leigh

Solicitors:

Appellant : Herbert Smith Freehills

Respondent : State Solicitor for Western Australia

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

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]
1 KB 223

Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321

Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139

Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 456; (1993)
43 FCR 280

Director of Liquor Licensing v Kordister Pty Ltd [2011] VSC 207

Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA
258; (2000) 22 WAR 510

Executive Director of Public Health v Lily Creek International Pty Ltd [2001]
WASCA 410

FAI Insurance Ltd v Winneke [1982] HCA 26; (1982) 151 CLR 342

Hancock v Executive Director of Public Health [2008] WASC 225
Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356
Highmoon Pty Ltd v City of Fremantle [2006] WASCA 21
Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6;
(1996) 185 CLR 259
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB
[2004] HCA 32; (2004) 78 ALJR 992
Minister for Immigration, Local Government and Ethnic Affairs v
Passhmforoosh (Unreported, FCA, 28 June 1989)
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
Pitsonis v Registrar of the Workers Compensation Commission [2008] NSWCA
88
R (Alconbury Developments Ltd) v Secretary of State for the Environment,
Transport and the Regions [2003] 2 AC 295
R (Association of British Civilian Internees Far East Region) v Secretary of
State for Defence [2003] QB 1397
R (Daly) v SSHD [2001] UKHL 26; [2001] 2 AC 532
R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd [1999]
2 AC 418
Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA
231; (2002) 25 WAR 511
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant
S20/2002 [2003] HCA 30; (2003) 77 ALJR 1165
Ritz Hotel Ltd v Charles of the Ritz Ltd (No 7) (1987) 14 NSWLR 104
Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue [2001]
HCA 49; (2001) 207 CLR 72
S v State Administrative Tribunal of WA [No 2] [2012] WASC 306
Tabet v Gett [2010] HCA 12; (2010) 240 CLR 537
Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384

Text(s) cited:

A Kavanagh, *Constitutional Review under the UK HRA 1998* (2009)
P Craig, *Administrative Law* (7th ed, 2012)
J King, 'Proportionality: A Halfway House' [2010] NZLR 327
P Craig, 'Proportionality, Rationality and Review' [2010] NZLR 265

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EDELMAN J:**Introduction**

- 1 On 6 June 2012, the Liquor Commission made a determination, by majority, rejecting an application by Liquorland for a conditional liquor licence. The Commission heard substantial evidence and submissions from two interveners and twenty-one objectors.
- 2 In the course of rejecting the application by Liquorland, the majority upheld an objection on behalf of residential objectors. The residents' objections were admitted as a block and treated as a single objection. No challenge was brought to the conclusion upholding that objection.
- 3 One of the central grounds of appeal concerned whether there was any evidence which could have supported the conclusion of the majority or whether the decision of the majority was manifestly unreasonable. The majority placed considerable reliance on evidence and submissions from a number of 'service provider objectors'. The service providers were organisations which provided significant support to groups of 'at risk' persons, particularly those suffering the ill effects of alcohol addiction. The majority described those service providers as having considerable expertise in dealing with alcohol related harm.
- 4 Liquorland submitted that the evidence of these service providers was nothing more than conjecture, guesswork, surmise or speculation. That submission must be rejected. The service providers were able to give, and did give, valuable evidence about the potential harm from the increased availability of cheap alcohol. This evidence, together with other evidence, supported the conclusion of the majority that there would be a real likelihood of harm and ill-health resulting from the grant of the application due to the proximity of the proposed liquor store to the four service providers.
- 5 It was also submitted by Liquorland that there was no evidence to support the assumption by the service providers that the proposed new store would lead to greater availability of cheap liquor. Amongst the litany of difficulties with this submission was the evidence led by Liquorland before the Commission of Liquorland's advertisements and internet slogans saying 'We beat everyone's liquor prices' and 'Even if they're crazy enough to undercut us we'll beat them again' and 'if you find a cheaper liquor price anywhere we'll beat it'.

6 Appeals from the Commission can only be brought on an issue of law. The Liquor Commission is a specialist tribunal with considerable experience. Grounds upon which a decision of this specialist tribunal can be challenged for an error of law are grounds of judicial review. It is well established that a review of such decisions should not be concerned with looseness in the language of the decision maker nor with unhappy phrasing of the reasons;¹ the decision under review should not be construed minutely and finely with an eye keenly attuned to the perception of error.²

7 Contrary to this approach, the submissions in support of each of the grounds of appeal in this case subjected the reasons of the majority of the Liquor Commission to a very fine analysis. Further, some paragraphs of the Commission's decision were taken out of context and submissions were made that certain paragraphs should be read in isolation. But when the reasons of the majority are read as a whole it becomes clear that none of the grounds of appeal can succeed. The appeal must be dismissed.

Background

8 The appellant, Liquorland, applied to the Director of Liquor Licensing for the conditional grant of a liquor store licence. Liquorland wanted the licence to trade as the First Choice Liquor Superstore at premises at 207 Guildford Road, Maylands. The proposed store was to be significantly larger than the average retail premises in the surrounding shopping area.³

9 The Director of Liquor Licensing referred Liquorland's application to the Liquor Commission of Western Australia for hearing and determination. The Executive Director of Public Health intervened in the proceedings.⁴ The Commissioner of Police also intervened.

10 Twenty-one persons and entities lodged objections to Liquorland's application and were also parties to the proceedings. The objectors included residents and business owners, a licensee of a liquor store within 2 km of the premises, and several service providers who provide services supporting disadvantaged people including:

¹ *Pitsonis v Registrar of the Workers Compensation Commission* [2008] NSWCA 88 [31] (Mason P).

² *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh & Gummow JJ).

³ Liquor Commission Determination LC 18/2012 [39], [47].

⁴ Under *Liquor Control Act 1988* (WA), s 69(8a)(b).

- (i) indigenous people suffering health issues sometimes alcohol related;
- (ii) people with mental health issues which may be compounded by easier availability of alcohol; and
- (iii) people who are homeless or at risk of homelessness a high percentage of whom had issues of drug and alcohol dependency.

11 By majority, the Liquor Commission rejected Liquorland's application.

The statutory framework

12 A brief outline of some of the relevant features of the *Liquor Control Act 1988* (WA) is as follows.

13 Section 38(1) and s 38(2) of the *Liquor Control Act* provide that an applicant for the grant of a licence 'must satisfy the licensing authority that granting the application is in the public interest'. The licensing authority in relation to an application under the *Liquor Control Act* is the Liquor Commission.⁵

14 The matters to which the Liquor Commission may have regard in determining whether granting an application is in the public interest include, but are not limited to, the following matters listed in s 38(4):

- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
- (b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
- (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and
- (d) any other prescribed matter.

15 Section 5 of the *Liquor Control Act* sets out primary and secondary objects of the Act. Under s 5(1) of the Act, the primary objects are as follows:

- (a) to regulate the sale, supply and consumption of liquor; and

⁵ *Liquor Control Act 1988* (WA), s 3, s 8.

- (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- (c) 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.

16 Section 33(1) provides that subject to the Act, the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest. Further, s 33(2)(a) provides that an application may be refused, even if the applicant meets all the requirements of the Act. In *Woolworths Ltd v Director of Liquor Licensing*,⁶ EM Heenan J described the 'absolute discretion' provided for under s 33(1) in the following terms:

The 'absolute discretion' to grant or refuse an application of any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole.⁷ Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest.⁸

The decision of the Liquor Commission of Western Australia

17 By majority, Mr Freemantle (Chairperson) and Ms Cogan (Member), with Mr Rafferty (Deputy Chairperson) dissenting, the Liquor Commission refused Liquorland's application. Liquorland appeals from that refusal. The only respondent to the appeal is the Executive Director of Public Health.

⁶ *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]. See also *FAI Insurance Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342, 368 (EM Heenan J).

⁷ *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASC 356 [6] - [7] (Wallwork J) and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241, 249 - 250 (Malcolm CJ), 263 (Wallwork J).

⁸ *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASC 231; (2002) 25 WAR 511, [52] - [55] (Parker J, Malcolm CJ & Anderson J agreeing); *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ); *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380, 400 (Malcolm CJ).

18 The reasons of the majority relied upon the following:

- (i) Evidence from residential objectors who were chiefly concerned with the loss of amenity which would result from the presence of a large liquor outlet in addition to the smaller ones already present in the vicinity.⁹ The objection on this ground was upheld by the majority of the Liquor Commission.
- (ii) Evidence from licensee objectors and their submission that Liquorland had failed adequately to deal with the effect of the application on at risk groups and had failed properly to support its application with objective evidence.¹⁰

19 The majority of the Liquor Commission expressed its overall conclusions in par 76 of its reasons. This paragraph, and the four preceding it, read as follows:

72 The Commission forms the view that the location of this proposed liquor outlet is a critical consideration in forming the view of the likelihood of harm and ill-health resulting from the grant of the application.

73 Evidence submitted identifies four establishments in the immediate vicinity which are dealing with at risk groups as defined by the [*Liquor Control Act*]. These establishments have made submissions as to the harm and ill-health likely to be caused by the granting of the application. It is the view of the Commission that these were not adequately dealt with by the applicant in its responsive submissions.

74 The EDPH in its intervention set out certain restrictions on trading that could be implemented to mitigate the risk were the application granted. The Commission considers that even with these restrictions imposed on the licensee there is a real likelihood of harm and ill-health resulting from the grant of the application due to the proximity of the outlet to the four service institutions. The conclusion of Ipp J in *Executive Director of Public Health v Lily Creek international Pty Ltd & Ors* supra referred to in 65 above is again relevant.

Wheeler J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410 concurs where she said:

⁹ Liquor Commission Determination LC 18/2012 [49] - [51].

¹⁰ Liquor Commission Determination LC 18/2012 [52].

'it is not the "risk" of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made.'

75 The Commission finds that the evidence submitted to support the grant of the application for a new liquor store licence at this location does not satisfy the requirements of the Act.

76 Ultimately the Commission was of the view that, on assessing the evidence before it, any benefit of increased competition, range of products and diversity of choice is outweighed by the potential harm that would result if the application were to be granted.

20 It is necessary to set out these paragraphs in full because they are relevant to several grounds of appeal in relation to which Liquorland's submissions subjected the paragraphs to microscopic analysis. However, as I explain below, it is not possible to divorce these paragraphs from the remainder of the majority's reasons. The reasons must be read as a whole. Reading these passages in isolation can give a misleading picture.

The appeal and the grounds of appeal

21 By s 28(2) of the *Liquor Control Act* an appeal can only be brought to this Court from a decision of the Liquor Commission on a question of law; errors of mixed fact and law cannot be entertained.¹¹ It is common ground that the error of law must be 'material' in the sense that but for the error the decision might have been different.¹²

22 It follows that an appeal from the Liquor Commission must invoke the Court's judicial power to examine for legal error; the proceedings are in the nature of judicial review.¹³

23 On appeal from a decision of the Liquor Commission, a court should not be 'concerned with looseness in the language ... nor with unhappy phrasing' of the decision maker; the reasons for the decision under review should not be 'construed minutely and finely with an eye keenly attuned to the perception of error'.¹⁴

¹¹ *Highmoon Pty Ltd v City of Fremantle* [2006] WASCA 21 [36] (Pullin JA; Malcolm CJ & McLure JA agreeing).

¹² *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 359 (Mason CJ).

¹³ *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* [2001] HCA 49; (2001) 207 CLR 72, 79 [15] (Gaudron, Gummow, Hayne & Callinan JJ).

¹⁴ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh & Gummow JJ); *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280, 287 (Neaves, French & Cooper JJ).

24 The powers of this Court on appeal from the Liquor Commission are conferred by s 28(5) of the *Liquor Control Act*. They include the power to:

- (a) affirm, vary or quash the decision appealed against;
- (b) make any decision that the Commission could have made instead of the decision appealed against; or
- (c) send the decision back to the Commission for reconsideration in accordance with any directions or recommendations that the Court considers appropriate.

25 There is also power in any case to make any ancillary or incidental order that the Court considers appropriate.

Ground 1: Reversal of the onus of proof

26 Liquorland's first ground of appeal is that the Liquor Commission erred in law in finding (at par 73) that Liquorland was 'required to establish that the ground of objection referred to [in par 73] had not been made out'. Liquorland says that the Liquor Commission should have found, under s 73(10) of the *Liquor Control Act*, that the objectors carried the burden of establishing the validity of the objection, and had failed to do so.

27 Section 73 of the *Liquor Control Act* is entitled 'Objecting to applications, general right and rules as to'. Section 73(10) provides that '[t]he burden of establishing the validity of any objection lies on the objector'.

What the majority of the Liquor Commission did *not* do

28 The most fundamental reason why this ground of appeal must fail is because the majority of the Liquor Commission did *not* make any finding in par 73 concerning any objection.

29 One reason why the decision of the majority of the Liquor Commission cannot be construed as having made any finding concerning the 'ground of objection' in par 73 is because par 73 did not refer to any ground of objection. In that paragraph the majority referred only to 'submissions' made by the service provider objectors as to the harm and ill-health likely to be caused by the granting of the application and said of those submissions that they were not adequately dealt with by Liquorland.

30 Another reason why par 73 cannot involve a finding about *the* 'ground of objection' is that the submissions made by the service providers were submissions from several different objectors, some concerning *several different* grounds of objection. Each single objector might, individually, fail to satisfy an onus of establishing an objection, but the cumulative effect of the evidence might lead to the conclusion that an applicant has failed to satisfy its ultimate onus of showing that the application was in the public interest. It was in this manner that the majority treated and relied upon the evidence of the service providers.

31 A third reason why par 73 cannot be construed as a finding that Liquorland had not disproved objections, and thus as one that reversed the onus of proof, is that the majority in par 51 correctly identified the onus of proof for objections as resting on the residential objectors in relation to establishing the validity of those objections. Liquorland's submission concerning par 73 requires the reader to assume that the majority correctly, and expressly, stated the onus of proof in par 51 and then expressly determined an objection, but that 22 paragraphs later, the majority impliedly assumed the opposite in relation to the onus of proof, and then, by implication only, determined the objections of the service providers applying the wrong onus of proof.

32 A fourth reason why par 73 is not a finding involving a reversal of the onus of proof is that on each occasion that the majority referred to Liquorland's onus, or the matters Liquorland needed to demonstrate, reference was made to the requirement of public interest. On none of these occasions did the majority impermissibly suggest that Liquorland bore an onus of disproving objections.

- (i) As mentioned above, the majority referred in par 45 to Liquorland's obligations in relation to the requirement of public interest. The majority did not suggest that any onus was borne by Liquorland in relation to the question of whether the grant would increase levels of alcohol related harm, which was a central concern of the service providers' submissions.
- (ii) At par 46 the majority discussed the requirements of the *Liquor Control Act* and the need to take a balanced approach to the granting of new applications and the question of public interest.
- (iii) At par 60 the majority referred to the 'extent' to which Liquorland had demonstrated that the grant of the licence could be seen to be in the public interest.

- (iv) At par 61 the majority again referred to the onus on Liquorland to satisfy the requirement of s 38(4) of the *Liquor Control Act*: namely, to show that the application is in the public interest.
- (v) At par 65 the majority referred to the Commission's task as 'ultimately' having to make its determination on the balance of probabilities¹⁵ and the need for the Commission to balance the objects of the *Liquor Control Act*, including the object of minimising alcohol-related harm.

33 During oral argument, it was tentatively suggested by counsel for Liquorland that the Liquor Commission was required to make a determination of a ground of objection. There was no ground of appeal to this effect. And, as counsel properly accepted, there is nothing express in the *Liquor Control Act* which requires this conclusion. Rather, the provision in the predecessor legislation, which had previously required the Commission to make a determination concerning an objection, was not re-enacted when the *Liquor Control Act* was passed.¹⁶ Further, the *Liquor Control Act* specifically provides that an application may be granted even if a valid ground of objection is made out.¹⁷ Conversely, under s 33(2)(a), an application may be refused even if all requirements of the *Liquor Control Act* are met. There was no obligation upon the majority of the Liquor Commission to make a finding that any objection had or had not been proved.

What the majority of the Liquor Commission did

34 The only relevant onus in relation to the ultimate determination of whether an application should be accepted is in respect of the question of whether Liquorland had proved to the Liquor Commission that the application is in the public interest. This onus is borne by Liquorland as the applicant.¹⁸

35 Section 33(1) of the *Liquor Control Act* provides the Liquor Commission with 'an absolute discretion to grant or refuse an application'. As I have explained, that discretion is a very full and ample discretion, confined by the scope and purpose of the Act. The scope and purpose is, in turn, to be determined by the express objects of the Act and the legislation read as a whole.

¹⁵ *Liquor Control Act 1988* (WA) s 16(1)(b)(ii).

¹⁶ See *Liquor Act 1970* (WA) s 61(1), s 71(1).

¹⁷ *Liquor Control Act 1988* (WA) s 33(2)(b).

¹⁸ *Liquor Control Act 1988* (WA) s 38(2).

36 In considering whether an applicant has proved that the application is in the public interest, one relevant factor listed in s 38(4) is 'the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor'.

37 Once par 73 is read in its context, the only conclusion which can be drawn is that it constitutes no more than a criticism of the responsive submissions by Liquorland: that comprised part of the overall consideration of the factors involved in an assessment of whether granting the application was in the public interest, an assessment that was cognisant of the objects of the *Liquor Control Act*.

38 The Liquor Commission made no finding that any objector had proved its objections, nor that the particular basis of any objection had been proved. The majority of the Liquor Commission expressly treated the onus of the only issue that it had to decide, and the only issue that it did decide - whether the granting the application was in the public interest - as borne by Liquorland.

39 The first ground of appeal is dismissed.

Ground 2: The Liquor Commission's approach to the objections was not supported by evidence

40 Liquorland's second ground of appeal is that the Commission erred in law at par 73, par 74 and par 76 in its approach to the evidence required to establish an objection under s 74(1)(b) of the *Liquor Control Act*. Liquorland submitted that the Commission relied upon submissions unsupported by evidence or, alternatively, evidence in the abstract, of a possibility of harm or ill-health being occasioned by the proposed premises, rather than upon actual evidence that the proposed premises would be likely to occasion an undue risk of harm or ill-health having regard to the proved circumstances of the particular area.

41 This ground of appeal is misconceived. As explained in relation to ground 1 above, the majority of the Liquor Commission did not make any finding in relation to any of the particular objections raised by the separate service providers. Nor was it required to do so. What the majority of the Commission *did* conclude was that there was a 'risk' or 'real likelihood of harm and ill-health resulting from the grant of the application'. As explained below in relation to grounds 3 and 4, there *was* evidence, led by the objectors collectively (in groups), that supported these inferences, and which the majority used to inform its assessment of whether the award of a license to Liquorland was in the public interest. The majority's

consideration of the evidence in that manner is the subject of grounds 3 and 4 of this appeal.

Ground 3: Absence of evidence for findings of fact by the Liquor Commission

The matters raised by this ground of appeal

42 Ground 3 of Liquorland's grounds of appeal is that the Liquor Commission erred in law in par 72 to par 76 in finding or inferring that because of the proximity of four community service establishments to the proposed premises, the proposed premises would occasion a significant risk of harm or ill-health to the persons attending those establishments. According to Liquorland, there was no evidence before the Commission, having regard to the proved circumstances of the particular area, upon which such a finding or inference could be based.

43 At the heart of this ground, as well as the next, is the question of precisely what finding was made by the majority of the Liquor Commission in par 74, because that finding was a crucial link in the majority's chain of reasoning.

44 The finding in par 74 (quoted at [19] in these reasons) was that even with restrictions on trading that could be implemented to mitigate the risk arising from the proposed premises, 'there is a *real likelihood* of harm and ill-health resulting from the grant of the application due to the proximity of the outlet to the four service institutions'. This finding refers back to the majority's reasons in par 72 and par 73: (i) the 'critical consideration' of the location of the proposed liquor outlet to forming a view of 'the likelihood of harm and ill-health resulting from the grant of the application'; and (ii) submissions from the service providers 'as to the harm and ill-health likely to be caused by the granting of the application'.

45 The finding in par 74 concerned a crucial factor relied upon by the majority in reaching its conclusion that the granting of the application was not in the public interest. It was not a finding that any particular objection should be accepted.

46 One factor upon which the majority relied heavily in considering whether the grant of the application was in the public interest was the object in s 5(1)(b): 'to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor'. The majority made numerous references to the importance of the objects of the *Liquor Control Act* in

the determination of the public interest,¹⁹ including in par 43, par 61 and par 65. Further, the reference in par 74 to the 'real likelihood of harm and ill-health *resulting from* the grant of the application' echoes the object in s 5(1)(b) 'to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor'.

47 It is not entirely clear whether the finding of the majority that there was a 'real likelihood of harm and ill-health' was a finding that harm and ill-health would be more likely to occur than not, or whether it was a finding of a significant *risk* that harm or ill-health would result. It was common ground in submissions in this appeal that, as this third ground of appeal sets out, the majority's finding was that the proposed premises would occasion a *significant risk* of harm or ill-health to the persons attending those establishments. That interpretation is consistent with the reference in the same paragraph, par 74, to the relevant question being the '*risk* having regard to the proved circumstances of the particular area in relation to which the application is made' (emphasis added).²⁰ It is consistent with the majority's references to '*very plausible potential* for further harm to be caused to the "at risk" groups who are clients of the service provider objectors' in par 68. And it is consistent with the majority's reasoning in that same paragraph which cites Ipp J (with whom Owen & Miller JJ agreed) *Executive Director of Health v Lily Creek International Pty Ltd*,²¹ where his Honour said that, as a matter of statutory interpretation, the mere possibility, rather than probability, of harm or ill-health is a matter relevant to the consideration of public interest in all the circumstances.²²

The legal principles generally

48 Findings of fact and determinations made by the Liquor Commission must be supported by evidence. As Pullin JA explained in *Highmoon Pty Ltd v City of Fremantle*,²³ an error of law will occur if there is no evidence to support a finding of fact or the drawing of an inference. But it is not open to Liquorland to appeal from the decision of the Liquor

¹⁹ *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241, 250 (Malcolm CJ), cited in Liquor Commission Determination LC 18/2012 [43].

²⁰ Quoting from *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [59] (Wheeler J).

²¹ *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510.

²² *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510, 516 - 517 [28] (Ipp J). Compare, at common law, *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537.

²³ *Highmoon Pty Ltd v City of Fremantle* [2006] WASCA 21 [37].

Commission merely on the basis that excessive weight was placed on evidence. Such an appeal would not be an appeal on a question of law.²⁴

- 49 Speaking of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in *Australian Broadcasting Tribunal v Bond*,²⁵ Mason CJ quoted from the decision of Davies, Burchett and Lee JJ in *Minister for Immigration, Local Government and Ethnic Affairs v Passhmforoosh*:²⁶

[D]ecisions may be set aside because, being insufficiently supported by reason, they appear to be an improper exercise of the power conferred or arbitrary or because there was no evidence or other material sufficient to justify the making of the decision or the decision was so unreasonable that no reasonable person could have so exercised the power. The making of, or failure to make, a particular finding of fact in the course of the reasoning process may equally be attacked on any such ground. The taking into account of a fact found unreasonably or the failure to take into account a fact that a reasonable decision-maker would have found and taken into account provides a ground of review under ss 5(1)(e) and 5(2)(a) and (b) of the *ADJR Act*.

- 50 In *Executive Director of Public Health v Lily Creek International Pty Ltd*,²⁷ Wheeler J said that it is an error of law to draw an inference from a particular fact when that inference is not open to be drawn. An inference is a reasonable conclusion drawn as a matter of logic from assumed or known facts.

The decisions in the *Lily Creek International* litigation

- 51 Liquorland has placed considerable emphasis on the decision of the Full Court of the Supreme Court of Western Australia in *Executive Director of Public Health v Lily Creek International Pty Ltd*.²⁸ The case is cited in support of ground 2, which, as was explained above, is misconceived. The *Lily Creek International* litigation was also relied upon in relation ground 3 in which it was contended that there was an absence of evidence concerning the risk of harm to any person in a concrete sense.²⁹

- 52 The litigation in *Lily Creek International* concerned an application by Lily Creek International for a liquor licence in relation to a proposed

²⁴ *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510, 519 [45] (Ipp J).

²⁵ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 359.

²⁶ *Minister for Immigration, Local Government and Ethnic Affairs v Passhmforoosh* (Unreported, FCA, 28 June 1989).

²⁷ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [48].

²⁸ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410.

²⁹ Liquorland's outline of submissions, 8 November 2012 [14], [19].

hotel. The licence was granted by the Liquor Licensing Court. An appeal to the Full Court of the Supreme Court was allowed and the matter was remitted to the Liquor Licensing Court. By agreement of the parties no further evidence was called. The licence was again granted by the Liquor Licensing Court. Lily Creek International appealed again. The Full Court varied the order of the Liquor Licensing Court: the licence was granted but subject to conditions.

53 One ground of appeal in the second appeal was that the Licensing Court Judge 'failed to have proper regard to the minimisation of alcohol-related harm or ill-health to people, or any group of people ...'³⁰ Wallwork J (with whom Miller and Wheeler JJ agreed) said that the primary judge had erred in law in concluding that there was 'no more than a possibility of a small increase in harm or ill-health consequent upon the grant of this application', because that conclusion was 'inconsistent with all the evidence and the medical evidence that children in the community were being seriously harmed by reason of alcohol related neglect'.³¹

54 The evidence included testimony from an expert, Professor Gray, that a further liquor outlet would increase alcohol consumption, and, hence, harm which might flow from it, although it was not possible to predict the magnitude of the harm.³² On the remitter hearing, the Liquor Licensing Court Judge did not accept that evidence of Professor Gray for four reasons:³³

- (i) most of the research was carried out overseas in conditions not those of a 'small Western Australian country town';
- (ii) the outlet density in that particular area was not above average;
- (iii) Professor Gray's opinion was based upon sales, and there was no evidence that an increase in sales would result in an increase in consumption; and
- (iv) the overseas research was 'less than convincing' in supporting the conclusions advanced.

55 The Full Court in the second appeal held that the Liquor Licensing Court had erred by failing to accept the evidence of Professor Gray.

³⁰ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [2].

³¹ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [35].

³² *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [8]

(Wallwork J), [49] (Wheeler J).

³³ As extracted in *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [51] (Wheeler J).

Wallwork J held that the error was to downgrade, without sufficient reasons, the expert evidence, which was not contradicted in its overall effect.³⁴ Wheeler J generally agreed with Wallwork J and also held that the rejection of the expert opinion of Professor Gray on the basis that it lacked a factual foundation was erroneous, since the opinion was adequately supported by underlying facts referred to in evidence.³⁵

56 Wheeler J said:³⁶

The Act directs attention to the minimisation of alcohol related harm generally (s 5(1)(b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather, it seems to me that must necessarily be assessed against any existing harm or ill-health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the 'risk' of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made. It appears that the learned Judge approached his task without considering the relevance of the existing levels of alcohol-related harms.

57 With respect, I agree. In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing 'at risk' persons who might be further affected.

The evidence from the service providers

58 The evidence of the service providers was an important consideration which informed the ultimate conclusion of the majority (at par 76) that any benefit of increased competition, range of products and diversity of choice was outweighed by the potential harm that would result if the

³⁴ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [38].

³⁵ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [54].

³⁶ *Executive Director of Public Health v Lily Creek International Pty Ltd* [2001] WASCA 410 [59].

application were to be granted. And although, as I explain in relation to the next ground of appeal, the evidence of the service providers was not the only consideration, it is necessary to set it out in some detail, because Liquorland submits in this appeal that this evidence was mere speculation and conjecture.

59 The majority of the Liquor Commission described the service providers as located in four places within the vicinity. The majority explained that the service providers dealt with indigenous people, alcohol dependence and homelessness with its attendant high level of alcohol dependence.³⁷

60 The identity and operations of the service providers were described by the majority in par 37 as follows below.

- (i) The Shop Front: 170 Whatley Crescent, Maylands - outreach support and resource centre of disadvantaged people - many with mental health issues which may be compounded by easier availability of alcohol.
- (ii) 55 Central: 55 Central Avenue, Maylands - crisis accommodation for 24 people who are homeless or at risk of homelessness with a high percentage of clients with issues of drug and alcohol dependency.
- (iii) Elizabeth Hanson Autumn Centre - Derbarl Yerrigan Health Service Inc 340: 344 Guildford Road, Bayswater - provides accommodation and care to Indigenous clients from remote and rural communities for haemodialysis or peritoneal dialysis and other medical treatment.
- (iv) Derbal Bidjar Hostels (Aboriginal Hostels Ltd): 6 - 8 Harrow Street, Maylands - a 30 bed hostel for Indigenous people requiring medical treatment and also provides assistance to the homeless.

61 Liquorland submitted that the majority erred by relying upon 'the evidence' submitted by the service providers and 'their testimony'. Liquorland said that no evidence or testimony was given by the service providers and that they only made submissions (referred to by the majority at par 73) or, at most, expressed opinions and made assertions which were unsupported by evidence. In oral submissions, counsel for

³⁷ Liquor Commission Determination LC 18/2012 [53].

Liquorland characterised the representations by the service providers as 'conjecture, guesswork, surmise or speculation'.³⁸

62 These submissions should not be accepted. To the extent that the submission asserted that the evidence should not have been admitted, s 16(7)(a) of the *Liquor Control Act* provides that the Liquor Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply. The *Evidence Act 1906* (WA) does not apply to the proceedings before the Liquor Commission. The Liquor Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (s 16(7)). The flexibility provided by these provisions is discussed in detail by EM Heenan J in *S v State Administrative Tribunal of WA [No 2]*.³⁹ It was not suggested that the Liquor Commission failed to comply with any rules of procedural fairness in its consideration of evidence.

63 Even apart from the lack of application of the rules of evidence to the Liquor Commission, a category of 'admissible expert evidence ... consists of a generalisation from observed facts within the personal experience of the witnesses in a field outside ordinary lay experience'.⁴⁰ The evidence of the service providers was expert evidence in this category.

64 The service providers separately provided written documents to the Liquor Commission raising various different grounds of objection. Those documents combined evidence of facts, opinions and submissions.

65 The combination of the *submissions* of the different service providers was described by the majority at par 38 in the following terms:

The service providers submitted that the granting of the application would:

- a. encourage competitive pricing resulting in very cheap liquor which may damage persons who face delays for medical treatment, when there is so much alcohol available;
- b. not be of any benefit, and would in fact be a hindrance to the health and well being of clients;

³⁸ ts 32, borrowing from *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510, 524 [66] (Ipp J).

³⁹ *S v State Administrative Tribunal of WA [No 2]* [2012] WASC 306 [93] - [97].

⁴⁰ *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 7)* (1987) 14 NSWLR 104, 105 (McLelland J).

- c. make the risk of assisting clients with alcohol dependency issues extremely difficult when so much alcohol is available at cheaper prices; and
- d. increase pressure on staff, volunteers and clients through the sale of alcohol by another retail outlet particularly one selling alcohol at reduced prices.

66 The majority concluded that these submissions were not adequately dealt with by Liquorland.⁴¹ Each of the submissions (a) to (d) summarised various submissions by different service providers. If supported by evidence and capable of acceptance, each could justify the conclusion that because of the proximity of four community service establishments to the proposed premises, the proposed premises would occasion a significant risk of harm or ill-health to the persons attending those establishments.

67 The majority said that the evidence of the service providers had 'considerable weight' because 'these objectors had considerable expertise in dealing with alcohol related harm and their testimony in itself should be regarded to have strong evidentiary value'.⁴² This conclusion was not challenged in any ground of appeal. It is based on firm foundations.

68 There was relevant evidence about harm to 'at risk persons' from the service providers. That evidence was that the presence and increased availability of cheaper alcohol:

- (i) may damage persons who face delays for medical treatment;
- (ii) would in fact be a hindrance to the health and well being of clients;
- (iii) would make the risk of assisting clients with alcohol dependency issues extremely difficult; and
- (iv) would increase pressure on staff, volunteers and clients.

69 Some of the relevant evidence of the service providers is set out directly below. I will deal with the underlying assumption that there would be increased availability of cheaper alcohol separately.

70 First, there was evidence from Ms Williams, who serves on the Committee of Management at the Shopfront. Ms Williams explained that

⁴¹ Liquor Commission Determination LC 18/2012 [73].

⁴² Liquor Commission Determination LC 18/2012 [54].

the Shopfront is an outreach support and resource centre for disadvantaged people established in Maylands in 2001. She explained that '[m]any people who attend Shopfront have addiction issues and live in close proximity to the proposed superstore or are homeless and squatting in the area'.⁴³ She also said that the Shopfront had 3,000 clients in 2010; 778 nights were accommodation provided for people who did not have a place to sleep; and 4035 meals and 466 food hampers were provided.⁴⁴ The Shopfront did not allow alcohol on the premises.⁴⁵ Ms Williams expressed the opinion that⁴⁶

[t]he increased availability of alcohol would cause more people being ill affected by the effects of alcohol ... Our clients would themselves be at more risk of self harm or ill-health. Many of our clients have mental health issues and the easier availability of alcohol would compound these issues.

71 No submission was made before the Liquor Commission that Ms Williams' experience at the Shopfront was insufficient for her to express conclusions about the effect of increased availability of alcohol on her clients who were persons who were already at risk.

72 Secondly, there was evidence from Ms Brown, the acting Executive Officer at 55 Central, of the crisis accommodation provided by that centre. Accommodation was provided for 24 homeless or at risk people. Ms Brown expressed the opinion that the presence of liquor outlets in close proximity to 55 Central was 'making our task of assisting those with alcohol dependency issues extremely difficult'. Ms Brown also expressed the opinion that⁴⁷

there are a number of organisations such as ours who will certainly be faced with the *more difficult task* of assisting those who are fighting drug and alcohol dependency when there is *so much alcohol available and, no doubt, at cheaper prices resulting from greater competition* between the various outlets. (emphasis added)

73 There was also evidence from Mr Dunn, the General Manager of 55 Central. Mr Dunn gave detailed and substantial evidence about the chronic alcohol dependency among the clients of 55 Central.⁴⁸ He described how 55 Central was seeing an incremental rise in the number of people presenting with alcohol problems (including a 7% rise in the last

⁴³ Appeal Book 505.

⁴⁴ Appeal Book 506.

⁴⁵ Appeal Book 619.

⁴⁶ Appeal Book 505.

⁴⁷ Appeal Book 654.

⁴⁸ Appeal Book 1333 - 1335.

six months). He spoke of the addictive nature of alcohol. He described the liver and neurological health effects that alcohol was having on the persons presenting to 55 Central. And he explained, from his experience, that 'reducing the opportunities to purchase alcohol can be an important first step, particularly in the vulnerable early stages of rehabilitation'.⁴⁹ He concluded, pertinently, that 'the presence of a liquor superstore, *selling cut-price alcohol*, and located in relative close proximity to 55 Central, will provide a temptation to our residents that they simply don't need' (emphasis added).⁵⁰ He also said that 'the presence of a liquor superstore, selling cut price alcohol, will inevitably pose an even greater risk of relapse'.⁵¹

74 Again, it was not suggested before the Liquor Commission that Ms Brown or Mr Dunn were persons without relevant experience of the behaviour patterns of those persons who they were treating, or would treat, and who were 'at risk' of alcohol related harm or the effect on those persons of availability of cheap liquor. It was open for the majority to conclude, at par 54, that they had considerable experience.

75 **Thirdly**, there was evidence that the proposed store would be located close to the railway station and that, as the majority accepted, it would be a 'high volume "destination" liquor store'.⁵² Some of the clients of the service providers, such as Aboriginal Hostels Ltd, come from remote communities throughout Western Australia for short term (three month) stays.⁵³ The site of the proposed store is located extremely close to the train station which is itself close to Aboriginal Hostels Ltd.⁵⁴ As Liquorland submitted to the Liquor Commission, the store 'is also intended to provide a destination outlet easily accessible to passing traffic (either *by rail* or road)...' (emphasis added). The Regional Manager of Aboriginal Hostels Ltd gave evidence that that 60% of the clients were seeking medical treatment for alcohol related diseases and the availability of cheap liquor would increase the likelihood of harm to those persons.⁵⁵

76 **Fourthly**, and complementing the evidence of the service providers, was evidence from the delegate of the Executive Director for Public Health at the Department of Health, quoting from a number of reports.⁵⁶

⁴⁹ Appeal Book 1333.

⁵⁰ Appeal Book 1334.

⁵¹ Appeal Book 1335.

⁵² Liquor Commission Determination LC 18/2012 [64].

⁵³ Appeal Book 1336.

⁵⁴ Map at Appeal Book 2057.

⁵⁵ Appeal Book 1336.

⁵⁶ Appeal Book 595 - 596.

One was that of Marden Jacobs Associates (2005) to the Australian National Competition Council in which it is said, with reference to numerous pieces of research on the impact of price on consumption and harm:

The price of alcohol has a very direct impact upon the levels of purchase and consumption. Provision of alcohol at lower costs is known to increase consumption among various groups, especially those on limited incomes.

77 Other research referred to included that of Osterberg (2001) that 'alcohol price levels do have an independent effect on the level of alcohol consumption and alcohol related problems'.⁵⁷ Another report cited was that of Barbor et al (2010) who concluded that '[d]ozens of studies conducted in both the developed and developing countries have demonstrated that alcohol prices do have an effect on the level of alcohol consumption and related problems'.⁵⁸ Another report quoted was from the National Preventative Health Taskforce that '[s]tudies consistently show that lower-socioeconomic groups and people with limited disposable income ... are more directly impacted by the price of alcohol products'.⁵⁹

78 The evidence from the service providers was capable of supporting a finding by the Liquor Commission that cheaper liquor and more readily available liquor would cause a real likelihood of harm and ill-health to the 'at risk' groups that they treated, due to the proximity of the proposed store to the service providers.

The factual basis for the opinion of the service providers

79 Liquorland submitted that there was no factual basis for the assumption of the service providers that the proposed store might lead to cheaper prices or more ready availability of alcohol.⁶⁰ This remarkable submission must be rejected for seven reasons. !! 😊

80 **First**, the submission, as it developed, involved a descent into the precise weight to be attributed to various matters of evidence before the Liquor Commission. Such an exercise is the antithesis of the proper approach to be taken in proceedings akin to judicial review.

81 **Secondly**, the majority found that 'an outlet of this size [the proposed First Choice Liquor Superstore] would have an overwhelming majority of its floor space devoted to commonly consumed products with an emphasis

⁵⁷ Appeal Book 595.

⁵⁸ Appeal Book 595 - 596.

⁵⁹ Appeal Book 596.

⁶⁰ Liquorland's responsive submissions, 23 November 2012 [11(a)].

on low priced lines' (emphasis in original).⁶¹ The majority also found that the proposed premises would have 'a significant part of its business in the cheaper end of the market'.⁶² Even if it had been possible to do so, no ground of appeal challenged these findings of fact.

82 **Thirdly**, before the Liquor Commission, Liquorland had itself produced evidence that the new store would attract customers from other, pre-existing stores. Mr Vaughan, the WA State Business Manager for Liquorland, said that '[i]t is our experience that when new packaged liquor outlets open, other outlets generally experience a decrease in sales'.⁶³

83 **Fourthly**, the proposed stock list for the store was in evidence.⁶⁴ Mr Vaughan also said that the proposed store would be the size of *between 6 and 10 Liquorland stores* 'in terms of store size and turnover' and that this 'will enable us to provide these products at competitive prices'.⁶⁵

84 **Fifthly**, annexures to Mr Vaughan's witness statement showed examples of advertisements from a First Choice Liquor Superstore bearing slogans such as 'We beat everyone's liquor prices' and 'Even if they're crazy enough to undercut us we'll beat them again'.⁶⁶ There was also evidence that Liquorland's website promised that 'if you find a cheaper liquor price anywhere we'll beat it'.⁶⁷ In a breathtaking submission before the Liquor Commission, counsel argued that the small-print conditions upon these promises of cheap alcohol by his client (such as availability of stock by a competitor, verification of price etc) were such that disadvantaged or marginalised persons would not be able to meet them.⁶⁸ This submission was repeated on this appeal.⁶⁹ Even if this were correct, it is impossible to contend that these advertisements could not provide some evidence to support a conclusion that a significant part of the proposed store would involve lower prices and that cheaper liquor would be available in the area as a result of the proposed store. Liquorland eventually conceded in oral reply, in a considerable

⁶¹ Liquor Commission Determination LC 18/2012 [59].

⁶² Liquor Commission Determination LC 18/2012 [68].

⁶³ Witness statement of Mr Vaughan [26], Appeal Book 62.

⁶⁴ Witness statement of Mr Vaughan [19], Appeal Book 5 - 6; Annexure 2, Appeal Book 85 - 164.

⁶⁵ Witness statement of Mr Vaughan [11], Appeal Book 62; Annexure 1, Appeal Book 65 - 84.

⁶⁶ Witness statement of Mr Vaughan [11], Appeal Book 62; Annexure 1, Appeal Book 65

⁶⁷ Appeal Book 643.

⁶⁸ Commission ts 23.

⁶⁹ ts 98.

understatement, that '[t]here is the potential for some undefined degree of cheaper prices as a result of some further store'.⁷⁰

85 **Sixthly**, among the exhibits provided to the Liquor Commission were numerous advertisements for sale of liquor by a First Choice Superstore, including advertisements for prices. The prices for the sale of some bottles of wine were less than \$4.⁷¹ It was open to the majority to accept that prices ranging from \$3.89 for purchase of a single bottle of wine were, as the advertisements promised, cheap prices which could undercut smaller competitors.

86 **Seventhly**, a competitor analysis document in evidence described one competitor, Cellarbrations, as having 'Not Much To offer' and as one that 'would struggle with any volume'. Another Cellarbrations store was described as having a '[l]imited volume of beer'. A BWS store competitor was described as having a limited selection of beer. The Bayswater Hotel was described as having no real volume of wine on show. The Inglewood Hotel was described as holding 'minimal stock'. Your Shout Liquor was described as having 'not much to offer'.⁷² This evidence alone could support the conclusion of the majority that the proposed store was to be designed and operated as a high volume destination liquor store and that there was 'a very high likelihood for an increase in liquor sold for consumption in the store locality'.⁷³

87 For these seven reasons I reject the submission by Liquorland that there was no factual basis for the assumptions upon which the opinions of the service providers were based, namely that there would be a greater availability of cheap alcohol.

Conclusion on ground 3

88 The majority relied, in part, upon the real likelihood of harm and ill-health resulting from the grant of the application due to the proximity of the outlet to the four service institutions to reach the overall conclusion that any benefit of increased competition, range of products and diversity of choice is outweighed by the potential harm that would result if the application were granted.

89 An important, although not exclusive, aspect of this potential harm was the evidence of the service providers. The concern of the majority in

⁷⁰ ts 99.

⁷¹ Appeal Book 69.

⁷² Witness statement of Mr Vaughan [27], Appeal Book 63; Annexure 4, Appeal Book 169 - 170.

⁷³ Liquor Commission Determination LC 18/2012 [64].

this respect was variously expressed as 'the likely consequences *in all the circumstances* of the introduction of premises of this size in this location' (emphasis added);⁷⁴ the 'very plausible potential for *further* harm to be caused to the 'at risk' groups' (emphasis added);⁷⁵ 'the risk having regard to the *proved circumstances of the particular area* in relation to which the application is made' (emphasis added).⁷⁶

90 The majority did not assess the risk of the grant of the proposed licence in a vacuum; rather, risk was assessed in the circumstances of the particular area and, in particular, the effect that the grant of a licence would have on the 'at risk' groups in the area. There was sufficient evidence to support the conclusion of the majority that there was a real likelihood of harm and ill-health resulting from the grant of the application due to the proximity of the outlet to the four service institutions.

91 Ground 3 must be dismissed.

Ground 4: Manifestly unreasonable finding of fact by the Liquor Commission

92 Ground 4 is that further or alternatively to ground 3, the majority of the Liquor Commission's findings at par 72 to par 76 were manifestly unreasonable having regard to:

- (i) the evidence that there were various existing packaged liquor outlets already selling cheap liquor in closer proximity to each of the community service establishments than the proposed premises;
- (ii) the absence of evidence that those liquor outlets were having a negative impact on the 'at risk' persons attending the community service establishments;
- (iii) the absence of any evidence that the new premises would occasion an increased risk of harm and ill-health to such persons; and
- (iv) the unchallenged expert evidence to the effect that statistical evidence did not establish that the proposed premises would increase the risk of harm or ill-health in the particular area of this application.

⁷⁴ Liquor Commission Determination LC 18/2012 [66].

⁷⁵ Liquor Commission Determination LC 18/2012 [68].

⁷⁶ Liquor Commission Determination LC 18/2012 [74].

93 The 'manifestly unreasonable' ground of review, of which ground 4 of Liquorland's appeal is an example, is usually, although unfortunately, described as *Wednesbury* unreasonableness. The name derives from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁷⁷, which was once the leading decision in this area of law in England but is now of doubtful import there.⁷⁸ In *Wednesbury* the Master of the Rolls held that judicial review on the ground of manifest unreasonableness required that the decision be 'so unreasonable that no reasonable authority could ever have come to it'.⁷⁹ Accordingly, Liquorland submitted that the findings by the Liquor Commission were manifestly unreasonable 'in the sense that no reasonable tribunal could have made those findings'.⁸⁰

94 Liquorland also submitted that the finding by the Liquor Commission of a risk of harm was not 'rational or logical', in light of factor (i) above.⁸¹ In Western Australia, the Court of Appeal has held that '[i]f there is some evidence to support a finding of fact, then the reasoning process leading to the finding of fact will not be open to review as a question of law if the complaint is about mere illogicality in reasoning'.⁸² Mason CJ (with whom Toohey and Gaudron JJ agreed) made similar remarks in *Australian Broadcasting Tribunal v Bond*,⁸³ and indicated further that a broader approach, evident in some English cases, 'has not so far been accepted by this [High] Court'.⁸⁴

95 It is not necessary to determine whether, and to what extent, administrative review in Australia has now moved on from the historic English position and might recognise illogicality as a basis for judicial review. Nor is it necessary to determine the extent to which the approach recognised or suggested in more recent cases might be a verbal

⁷⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁷⁸ *R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd* [1999] 2 AC 418 (Lord Cooke); *R (Daly) v SSHD* [2001] UKHL 26; [2001] 2 AC 532, 548 - 549 [32] (Lord Cooke); *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 320 - 321 [51] (Lord Slynn); *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, 1412 - 1414 [33] - [37] (the Court). For a sample of the debate see A Kavanagh, *Constitutional Review under the UK HRA 1998* (2009) 243 - 253; P Craig, *Administrative Law* (7th ed, 2012) 647 - 675 [21-005] - [21-038]; J King, 'Proportionality: A Halfway House' [2010] NZLR 327; P Craig, 'Proportionality, Rationality and Review' [2010] NZLR 265.

⁷⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (Greene MR).

⁸⁰ Liquorland's submissions, 8 November 2012 [25].

⁸¹ Liquorland's submissions, 8 November 2012 [26].

⁸² *Highmoon Pty Ltd v City of Fremantle* [2006] WASC 21 [36] (Pullin JA; Malcolm CJ & McLure JA agreeing) citing *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 156 - 157 (Glass JA) and *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 356 (Mason CJ). The observations of Mason CJ were expressly endorsed by Toohey & Gaudron JJ at (387).

⁸³ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321.

⁸⁴ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 357.

reformulation of, supplant, or exist alongside, the traditional *Wednesbury* formulation of review by asking whether the decision reached was 'irrational, illogical, and not based on findings or inferences of fact supported by logical grounds'.⁸⁵

96 The reason that it is not necessary to determine the issue is that even if the second test is treated as a broader, more liberal, approach to review, the fourth ground of appeal must be dismissed on either formulation. There are four reasons why this ground of appeal must be dismissed.

97 **First**, the evidence of the service providers described above in relation to ground 3 establishes a reasonable and logical foundation upon which the majority could have reached their conclusion that any benefit of increased competition, range of products and diversity of choice is outweighed by the potential harm that would result if the application were to be granted.

98 **Secondly**, there are misconceptions underlying each of the factors (i) to (iv) relied upon by Liquorland as part of this ground of appeal.

99 As to factor (i) (the presence of other outlets in closer proximity to the service providers), the majority found that because of the proximity of four community service establishments to the proposed premises there was a significant risk of harm or ill-health to the persons attending those establishments. The majority concluded that the four service providers were within the vicinity of the proposed premises.⁸⁶ The majority explained that the location was 'a critical consideration in forming the view of the likelihood of harm and ill-health resulting from the grant of the application'.⁸⁷

100 The implicit inference being drawn by the majority was that many individuals who visit the four service providers have living arrangements within the vicinity. The location of the service providers provided an indication that 'at risk' *individuals* lived in the area. Factor (i) of this ground of appeal assumed that it was only the location of the *service providers* which was relevant to whether the 'at risk' groups would be exposed to increased availability of cheaper liquor. On that premise, Liquorland submitted that there are various existing packaged liquor

⁸⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992, 998 [38] (Gummow & Hayne JJ). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165, 1172 [37] (Gleeson CJ), 1175 [52] (McHugh & Gummow JJ), 1194 [173] (Callinan J).

⁸⁶ Liquor Commission Determination LC 18/2012 [53].

⁸⁷ Liquor Commission Determination LC 18/2012 [72].

outlets already selling cheap liquor in closer proximity to each of the community service establishments than the proposed store.

101 The problem with factor (i) is its premise. Although a small number of persons treated by the service providers are resident there, it is not merely the location of the service providers which is relevant to the exposure of the 'at risk' persons to cheap alcohol. A more relevant question is where *those 'at risk' people* live and whether they will encounter the proposed store on their daily travels, including to the service providers. Although the majority of the Liquor Commission, at par 74, referred to the likelihood of harm and ill-health resulting from the grant of the application due to the proximity of the outlet to the four service institutions, the majority was concerned with the harm to *individuals* who would *visit* those institutions (see par 68), including the many individuals who travel there. Liquorland's assumption that all those people, including the homeless, would be more likely to encounter an existing store and would be in closer proximity to an existing store than the proposed new store has no foundation in the evidence. Indeed, the evidence of Ms Williams from the Shopfront was that '[m]any people who attend Shopfront have addiction issues and *live in close proximity to the proposed superstore or are homeless or squatting in the area...*' (emphasis added).⁸⁸

102 As to factors (ii) and (iii), there *was* considerable evidence of the effect of existing outlets on the 'at risk' persons visiting the service providers and there was also evidence that the new store would occasion increased risk. That evidence has been canvassed in relation to the third ground of appeal. A specific example of the evidence of harm caused by existing liquor stores is the evidence of Ms Brown, described above, that 'there are a number of liquor outlets within 500 metres of our premises making our task of assisting those with alcohol dependency issues extremely difficult'.⁸⁹

103 Even if there were an absence of evidence that the existing liquor outlets were having a negative impact on the 'at risk' persons attending the community service establishments, it would be more relevant that the proposed *new* premises would have a negative impact on these at risk persons (factor (iii)). And the opinion evidence from some of the service providers, set out above, was that it would.

⁸⁸ Appeal Book 505.

⁸⁹ Appeal Book 654.

104 Factor (iv) is also based upon a misconception. The Liquor Commission was presented with 'a considerable body of research which demonstrates a correlation between outlet density and harm caused'.⁹⁰ The majority held that in light of evidence provided by Dr Henstridge, a cautious view should be taken to this statistical evidence.⁹¹ The majority said that Dr Henstridge 'went as far as to conclude that the statistical evidence *itself* is not able to tell whether or not a First Choice Liquor Store is likely to increase harm in Maylands' (emphasis added).⁹² But the majority quoted with approval from Bell J in *Director of Liquor Licensing v Kordister Pty Ltd*,⁹³ explaining that this evidence 'may nonetheless *be relevant* and admissible, for it may, depending on the circumstances, *assist* in determining the likelihood that harm is occurring or will occur'.⁹⁴

105 **Thirdly**, the conclusion by the majority of the Liquor Commission that the potential harm would outweigh any benefit of increased competition, range of products and diversity of choice was not confined to harm or ill-health to the 'at risk' groups. That is, contrary to the submission by Liquorland, there is nothing to suggest that the 'ultimate' conclusion in the penultimate paragraph of the majority's reasons was confined to its findings of the potential harm discussed in the immediately preceding paragraphs. The conclusion of the majority also related to its findings of harm that were consequential upon upholding the residential objectors' objections.

106 The contrary suggestion by Liquorland was that the majority's conclusion was based only upon weighing the benefits of the grant of a licence with the detriment of the real likelihood of harm and ill-health identified by the service providers. This is another example of taking sentences or paragraphs of the reasons of the majority out of context and then subjecting those sentences, in isolation, to searching analysis. The submission must be rejected.

107 The majority began the discussion in par 76 with the word 'ultimately'. This suggests an intention to incorporate all the preceding reasons, not merely the immediately preceding paragraphs.

⁹⁰ Liquor Commission Determination LC 18/2012 [70].

⁹¹ Liquor Commission Determination LC 18/2012 [71].

⁹² Liquor Commission Determination LC 18/2012 [70].

⁹³ *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207.

⁹⁴ Liquor Commission Determination LC 18/2012 [71] citing *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 [186].

108 The ultimate conclusion of the majority in par 76 also referred to the 'potential harm' that would result if the application were granted. That conclusion was expressed to have been reached by 'assessing the evidence before it'. It was not expressed in words to suggest that it was confined to the 'likelihood of harm and ill-health' discussed in par 72 to par 74. Nor was it expressed as confined to the evidence before it from only the service providers.

109 The expression of the conclusion in par 76 was a weighing process of benefits and harm. When the reasons are read as a whole, there is no basis for the submission that the majority had ignored the finding they made in relation to the evidence of 'increased harm' identified by the residential objectors in par 50 - par 51.

110 For these reasons, ground 4 is dismissed.

Ground 5: Erroneous reference to a definition of 'at risk groups'

111 The fifth ground of appeal by Liquorland is that the Liquor Commission erred in law in par 73 because it misconstrued the *Liquor Control Act* by finding that clients of the four establishments referred to therein were 'at risk groups' as defined by the *Liquor Control Act*. Liquorland says that in so doing, the Liquor Commission failed to determine the relevant objection in accordance with s 74(1)(b) of the *Liquor Control Act*, and further or alternatively that it wrongly exercised or fettered its discretion by reference to a policy of the Department of Racing Gaming and Liquor without paying regard to the proper characterisation of the said clients in accordance with objective evidence.

112 It is common ground that the majority of the Liquor Commission erred when it described 'at risk groups' as defined by the *Liquor Control Act*. There is no definition of 'at risk groups' in the *Liquor Control Act*.

113 This error is immaterial. The ground of appeal exemplifies what Martin CJ, quoting from Kirby J, described as 'combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law'.⁹⁵

114 First, the infelicitous reference to 'at risk groups' as being defined in the Act could not have made any difference to the determination by the majority of the question of 'public interest'. It was not submitted by Liquorland, nor could it be submitted, that the group of people described

⁹⁵ *Hancock v Executive Director of Public Health* [2008] WASC 225 [70].

as 'at risk' fell outside the 'group' described in the object of minimising harm or ill-health caused to people, *or any group of people*, due to the use of liquor.⁹⁶ Nor was it submitted, and nor could it have been submitted that the group of people described as 'at risk' fell outside the 'group' described in one of the factors for consideration of the public interest in s 38(4)(a): 'the harm or ill-health that might be caused to people, *or any group of people*, due to the use of liquor' (emphasis added).

115 **Secondly**, the reference to the group being 'at risk' was made in the context of describing submissions of the service providers. No weight was placed on the definition of 'at risk'. Nor did the majority determine any ground of objection by any of the service providers, contrary to the assertion in this ground of appeal.

116 **Thirdly**, there is no basis for the assertion that the majority of the Liquor Commission, by mistakenly describing 'at risk groups' as defined in the *Liquor Control Act*, fettered its discretion by making reference to a policy of the Department of Racing Gaming and Liquor without paying regard to the proper characterisation of the said clients in accordance with objective evidence. No reference is made by the majority to any policy of the Department of Racing Gaming and Liquor. The reference to 'at risk groups' may have been taken from the descriptions used by both the Executive Director and by Liquorland in their submissions before the Liquor Commission.⁹⁷ The majority referred to the submissions of Liquorland which had relied on a report from MGA Town Planners concluding that there was a low representation of 'at risk' groups in the locality.⁹⁸

117 The fifth ground of appeal must be dismissed.

Ground 6: Error of law by misapplying a passage from the second reading speech

118 The final ground of appeal is that the Liquor Commission erred in law at par 44 in its application of the *Liquor Control Act* because the Commission referred only to the passage cited at page 6342 of the second reading speech for the *Liquor and Gaming Amendment Act 2006*. The appellant's submission is that the Liquor Commission should also have referred to passages at pages 6341 and 6344 of the second reading speech which refer to a significant purpose of the Act being to promote diversity in the way liquor services are provided to consumers, a more competitive,

⁹⁶ *Liquor Control Act 1988* (WA), s 5(1)(b).

⁹⁷ Appeal Book 13; Appeal Book 765.

⁹⁸ Liquor Commission Determination LC 18/2012 [71].

responsible and dynamic liquor environment, and better meet the changing expectations of consumers.

119 At par 44 the majority of the Liquor Commission said:

The *Interpretation Act 1984* at section 19 provides that regard may be had to extrinsic material, including a Second Reading Speech to a Bill, when considering the meaning and intent of a written law.

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.'

120 This ground of appeal is hopeless. 

121 First, and fundamentally, the role of the Liquor Commission is to make its determination, and give its reasons, by reference to the *Liquor Control Act*. The passages from the second reading speech were referred to by the majority of the Liquor Commission only as extrinsic material to assist in the interpretation of the *Liquor Control Act*, and immediately after setting out the objects of the Act. Admittedly, the exact purpose served by the reference to that passage from the second reading speech is not immediately clear, but the purpose is elucidated when read in its context in the reasons: that is, immediately following a reference to the objects of the Act and immediately preceding a reference to the public interest test. It is therefore important to note that the second reading speech to the 2006 amendments introduced changes which included:

- (i) amendments to the 'objects' of the *Liquor Control Act* in s 5; and
- (ii) replacing the previous 'needs' test in the *Liquor Control Act* with the public interest test.

122 Nothing in the majority's reasons suggests that the majority took the second reading speech to alter the plain meaning of the objects in s 5, which were iterated and reiterated throughout the majority's decision. Nor does anything in the majority reasons suggest that the majority

elevated the status of the final sentences of the quotation to that of a statutory text.

123 **Secondly**, the quotation from the second reading speech was immediately preceded by a discussion of the objects of the *Liquor Control Act* and immediately followed by a discussion of the public interest test and the obligations of Liquorland in satisfying that test. Liquorland did not suggest that the majority erred in either of these aspects of their reasoning. Nor did Liquorland submit that the majority had erred in any of their many statements of the public interest test to be applied.

124 **Thirdly**, it is not an error of law for the majority of the Liquor Commission to have failed to refer to passages from a second reading speech which an applicant might have wished to have seen in the reasons. In any event, it is hard to see what purpose would have been served by the majority making any reference to those pages of the second reading speech which refer to purposes of the *Liquor Control Act*. The objects of the *Liquor Control Act* are set out in s 5. There was no submission that these objects were ambiguous or that there was any need to refer to purposes discussed in the second reading speech in order to construe any other provision of the *Liquor Control Act*.

125 The sixth ground of appeal must be dismissed.

Conclusion

126 In reaching a determination whether an application is in the 'public interest', the 'absolute discretion' conferred upon the Liquor Commission by s 33(1) of the *Liquor Control Act* is a very full and ample one. It is a discretion confined only by the scope and purpose of the Act, which is in turn to be determined by the express objects of the Act and the legislation read as a whole.

127 An appeal from a determination of the Liquor Commission on a question of law invites consideration of the usual grounds of judicial review, many of which were raised on this appeal. It is not an opportunity for the appellate court to substitute a decision which might alternatively have been reached on the evidence. Nor is the right of appeal in these cases an opportunity to scrutinise reasons with a fine toothcomb. Still less is it an opportunity to engage in this exercise after divorcing some paragraphs from the rest of the decision and the whole of the evidence, which in this case was voluminous.

128 The appeal must be dismissed.