

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Liquorland (Australia) Pty Ltd
(represented by Mr Steven Standing on instructions from Herbert Smith Freehills)
- Intervener:** Director of Liquor Licensing
(represented by Ms Danielle Underwood of State Solicitor's Office)
- Commission:** Mr Seamus Rafferty (Chairperson)
Ms Mara Barone (Member)
Mr Denis Temby (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for the conditional grant of a liquor store licence for premises to be known as "Liquorland Gateways".
- Premises:** Liquorland Gateways, 816 Beeliar Drive, Success
- Date of Hearing:** 18 August 2016
- Date of Determination:** 27 March 2017
- Determination:** The application for the conditional grant of a liquor store licence is approved.

Authorities referred to in Determination:

- *Woolworths v Director of Liquor Licensing* [2013] WASCA 227
- *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210
- *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors* unreported, FCt SCt of WA, Library No 940553; 7 October 1994
- *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* [2016] WASC 40

Background

- 1 Pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) Liquorland Australia Pty Ltd (“the applicant”) has applied for a review of the decision of the delegate of the Director of Liquor Licensing (“the Director”) to refuse the conditional grant of a liquor store licence for premises to be known as Liquorland Gateway. The application was determined by the Director and reasons for the refusal of the application published on 16 May 2016.
- 2 There were no objections or interventions in respect to the application.
- 3 The Director of Liquor Licensing intervened in the proceedings before the Liquor Commission (“the Commission”) pursuant to section 69(11) of the Act.

Applicant’s evidence and submissions

- 4 The application relates to a proposed liquor store adjacent to an existing Coles supermarket inside the Cockburn Gateway Shopping Centre. The proposed liquor store is 177 square meters in size, with a coolroom of 32 square meters and a stock area of 14 square meters.
- 5 The applicant primarily relied upon the following evidence in support of the application:
 - a) Report prepared by MGA Town Planners (“the MGA Report”);
 - b) Report prepared by Bodhi Alliance (“the Bodhi Report”);
 - c) Report prepared by Data Analysis Australia (“the DAA Report”).
- 6 In discharging the onus prescribed by section 38(2) of the Act, the applicant submitted that the following matters were of relevance:
 - a) the granting of the licence would increase choice within the shopping centre;
 - b) the proposed store would offer competitive pricing;
 - c) there would be a revised layout of the store which would promote consumer convenience and service;
 - d) the store would incorporate displays matching wine with food;
 - e) the store will have comprehensive security measures which will benefit the security and safety of consumers at the shopping centre.
- 7 For the purposes of these reasons, the Commission incorporates the analysis of the evidence outlined in the written decision of the delegate of the Director at first instance between paragraphs 9 and 13.

- 8 The Commission has considered a number of applications from this applicant and can take into account as a notorious fact that it is a responsible entity that takes its obligations of selling a potentially harmful product seriously by way of implementing harm minimisation measures.

Submissions on behalf of the Director

- 9 It was submitted on behalf of the Director that 'the decision of the Delegate was cogent and compelling and it is open for the Liquor Commission to affirm those reasons.'
- 10 The submissions on behalf of the Director raised the following issues for consideration:
- a) consumer requirement;
 - b) evidence of consumer requirement;
 - c) extent to which consumer requirement is met in the locality of the premises;
 - d) proper development of the liquor industry;
 - e) alcohol related harm and ill-health issues.
- 11 In written submissions dated 4 August 2016, counsel for the Director stated that, '...in order for the Liquor Commission to conclude that the grant of the Application materially caters for the requirements of consumers of liquor, the Applicant is required to, by cogent evidence, prove that there is, in fact, a consumer requirement – that is, some call by consumers for the products and services that will be offered at the Premises and that the grant of the Application will cater for that requirement in a way which can be said to be beneficial to the public interest.'

Statutory Framework

- 12 In *Woolworths v Director of Liquor Licensing*¹ His Honor Buss JA set out the statutory framework for a determination of an application pursuant to section 25 of the Act in the following terms, namely:
- a) by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
 - b) the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;²

¹ [2013] WASCA 227

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which

- c) the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
- d) the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;
- e) section 5(2) is mandatory whereas section 38(4) is permissive;
- f) on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

Assessment of the evidence

- 13 The applicant seeks to operate a relatively small browse-style liquor store adjacent to an existing Coles supermarket. Within the locality, there are six packaged liquor outlets, which include a BWS store within the shopping centre, a Cellarbrations drive-through facility attached to the Gate Tavern, which is approximately 100 meters from the proposed premises and a First Choice outlet.
- 14 In respect to the DAA report, two surveys were conducted to assess the level of public support for the application. The first survey involved a telephone survey of residents within a 3km radius of the proposed liquor store and the second survey involved an intercept survey of shoppers within the Cockburn Gateway Shopping Centre. The relevant findings of the report were that 57% of respondents to the telephone survey and 62% of respondents to the intercept survey indicated support for the application. When the data for respondents who purchase takeaway liquor were considered, the statistics were 66% support for those surveyed by telephone and 70% for the intercept survey participants.
- 15 There are no harm or ill-health issues raised in the context of this application as reflected by the MGA and Bodhi Reports.

a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute. See *O'Sullivan* (216).

- 16 The applicant primarily relies upon the benefits to the community of increased choice and competition for one-stop shopping within the shopping centre precinct.

Conclusion

- 17 His Honour Buss JA noted in *Woolworths Ltd v Director of Liquor Licensing*³ that, 'it is a notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres.'⁴ The Commission is therefore entitled to take this factor into account in determining whether the grant of the application is in the public interest.
- 18 Reference was made by the Director in his written reasons for decision to the Full Court decision of *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors.*⁵ The Director stated that, 'However, the Court of Appeal [*sic* – *should read Full Court*] held that the Liquor Licensing Court Judge had not erred in finding as a fact that, in view of the presence of the existing outlet so close to the supermarket as to almost be part of the shopping centre, any subjective requirement of the relevant section of the public for a liquor store to be located within the supermarket was not objectively reasonable.'
- 19 Reliance on the Full Court decision is misplaced. That decision was determined on the basis of section 38(1) of the Act as enacted at that time. The relevant statutory test at that time was:

An applicant for the grant or removal of a Category A licence must satisfy the licensing authority that, having regard to:

- a) the number and condition of the licensed premises already existing in the affected area;*
- b) the manner in which, and the extent to which, those premises are distributed throughout the area;*
- c) the extent and quality of the services provided on those premises; and*
- d) any other relevant factor, being a matter as to which the licensing authority seeks to be satisfied, the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area.*

- 20 Section 38(2) of the Act as then enacted was:

Taking into account the matters referred to in subsection (1), the licensing authority in considering what the requirements of the public may be shall have regard to:

- a) the population of, and the interest of the community in, the affected area;*

³ [2013] WASCA 227

⁴ *supra*, at [78]

⁵ unreported, FCt SCt of WA, Library No 940553; 7 October 1994

b) *the number and kinds of persons residing in, resorting to or passing through the affected area, or likely in the foreseeable future to do so, and their respective expectations; and*

c) *the extent to which any requirement or expectation:*

i) *varies during different times or periods; or*

ii) *is lawfully met by other premises, licensed or unlicensed.*

- 21 The test by which the decision referred to by the delegate was determined was the “needs test” As was noted by His Honour Martino J in *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police*⁶, the Commission cannot apply the “needs test” in determining applications under the existing legislation.
- 22 Accordingly, the Commission has not considered the issue of “need” in determining this application. The Commission does not consider that section 5(1)(c) of the Act imposes a positive onus on an applicant to establish that there is a need or requirement for the granting of the application. That section relates to an objective assessment of whether the granting of the application will 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. The submissions made on behalf of the Director in respect to this issue are rejected by the Commission.
- 23 Reference to previous Commission decisions is also of limited utility. Each application must be dealt with on its merits. In this case, the application is for a liquor store licence within a very large suburban shopping centre that has recently been redeveloped with the addition of further retail stores, food outlets and increased parking. The previous comments of the Commission as to it not being in the public interest to place liquor outlets at every corner delicatessen or beside every supermarket are irrelevant to an application of this nature.
- 24 The function of the Commission in the context of an application pursuant to section 25 of the Act is to determine the application on a *de novo* basis and there is no requirement to find error in respect to the decision made at first instance. In the context of this application, the Commission has considered the evidence in support of the application and made its decision solely on an assessment of that evidence. However, the Commission has noticed a trend in decisions made at first instance to be based on irrelevant considerations and appellate decisions determined under previous legislation and has drawn attention to these errors, so that future applications will be determined properly according to the Act as it currently stands.
- 25 The fundamental issue for the Commission to determine in this application is whether the applicant has discharged the onus prescribed by section 38(2) of the Act and proven on balance that the granting of the application is in the public interest. Having regard to all of the materials before the Commission, we are of the view that the

⁶ [2016] WASC 40

applicant has discharged its onus and established that the granting of the application is in the public interest for the following reasons:

- a) the granting of the application will provide a one-stop shopping experience for those who purchase their groceries from the Coles supermarket adjacent to the proposed premises;
- b) one-stop shopping is of great importance to the many members of the community who lead busy and time poor lifestyles;
- c) the granting of the application will provide greater choice for those who purchase packaged liquor within the shopping centre;
- d) the applicant is an experienced operator that is committed to the responsible service of alcohol;
- e) there are no harm or ill-health issues associated with the granting of the application;
- f) the granting of the licence will not result in the proliferation of liquor outlets in the locality;
- g) the granting of the licence will not impact negatively upon the amenity of the locality;
- h) there is no evidence to suggest that offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the proposed licensed premises;
- i) there is a significant body of support for the granting of the licence as reflected by the results included in the DAA Report.

26 It is upon the collective weight of these factors that the Commission has concluded that the granting of the application is in the public interest and is consistent with the primary and secondary of objects of the Act.

27 The decision of the Delegate of the Director is quashed and the application is granted subject to standard conditions applied to liquor store licences by the licensing authority.



SEAMUS RAFFERTY
CHAIRPERSON