

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Liquorland (Australia) Pty Ltd
*(represented by Mr Steve Standing of
Herbert Smith Freehills)*
- Intervener:** Director of Liquor Licensing
*(represented by Mr Andrew Mason of State
Solicitor's Office)*
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Dr Eric Isaachsen (Member)
Mr Paul Heaney (Member)
- Matter:** Application pursuant to section 25 of the
Liquor Control Act 1988, for a review of a
decision by the delegate of the Director of
Liquor Licensing to refuse an application for
the grant of a liquor store licence for
premises to be known as *Liquorland Secret
Harbour*.
- Premises:** Liquorland Secret Harbour, Secret Harbour
Shopping Centre, 420 Secret Harbour
Boulevard, Secret Harbour
- Date of Hearing:** 21 February 2017
- Date of Determination:** 21 March 2017
- Determination:** The application for the grant of a liquor store
licence is approved.

Authorities referred to in Determination:

- *Woolworths Ltd v Director of Liquor Licensing* WAR 446
- *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Liquorland (Australia) Pty Ltd v Commissioner of Police* (LC18/2015)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

Background

- 1 On 23 December 2015, Liquorland (Australia) Pty Ltd (“the applicant”) lodged an application, pursuant to section 68 of the *Liquor Control Act 1988* (“the Act”), for the grant of a liquor store licence for premises to be known as “Liquorland Secret Harbour”. A Public Interest Assessment (“PIA”) and other supporting documentation were submitted with the application.
- 2 The proposed liquor store is to be located within the Secret Harbour Shopping Centre (“the Centre”) adjacent to a Coles supermarket and with a total licensed area of 194m². There are to be two entrances to the store: one from the Coles Supermarket and one from the mall area of the Centre.
- 3 On 16 February 2016, Woolworths Limited (“Woolworths”) lodged an application for the conditional grant of a liquor store licence for premises to be known as “Dan Murphy’s” and located within the Secret Harbour Shopping Precinct, although external to the Shopping Centre.
- 4 As a consequence of there being two liquor store applications within close proximity to one another, the Delegate of the Director of Liquor Licensing (“the Director”) determined that they were competing applications which should be heard together.
- 5 On 7 September 2016, the Director considered the applications on the papers pursuant to sections 13 and 16 of the Act, and determined to approve the application by Woolworths and refuse the application by the applicant.
- 6 On 6 October 2016, the applicant lodged an application with the Liquor Commission (“the Commission”) pursuant to section 25 of the Act, for a review of the decision of the Director to refuse the application.
- 7 On 3 November 2016, in accordance with section 69(11) of the Act, the Director lodged a notice of intervention in respect of the review.
- 8 Submissions and responsive submissions were lodged by both parties in the period leading to the hearing which was held on 21 February 2017.

Preliminary Matter

- 9 Prior to the hearing, the Commission determined that the written material submitted by Woolworths under the competing applications approach adopted by the Director and considered pursuant to section 16(12) of the Act, would not be admissible for the purposes of the review hearing. Accordingly, the review hearing would be based solely on the application by Liquorland and the material relevant only to that application in accordance with section 25(2)(c) of the Act.

Submissions on behalf of the applicant

- 10 It was submitted that this is an application for a liquor store licence in a large, triple supermarket shopping centre, which is currently being extended to meet the needs of a locality, the population of which has more than doubled since 2006 and will continue to grow for many years.
- 11 Consumers will have the benefit of competition between Coles, Woolworths and Aldi supermarkets and other retail outlets, which the grant of this application would extend to the consumers of liquor.
- 12 It was submitted that there is no evidence of any negative aspects to the proposed store which could be weighed against the public interest evidence in favour of the grant of the application. In particular the evidence shows no risk of alcohol related harm arising from the grant of this licence.
- 13 Where there is clear evidence of consumer demand in support of an application and no negative aspects, the only conclusion which is open is that the grant of the application is in the public interest (*Woolworths Ltd v Director of Liquor Licensing WAR 446 at (7), (8)*).
- 14 It was submitted that the evidence provided in the *Planning and Amenity Impact Assessment Report – Proposed Liquorland Secret Harbour*, prepared by Bodhi Alliance (“the Bodhi Report”) shows that the locality is a rapidly expanding area with a population that is estimated to have doubled in the 2006-2011 inter census period to 14,354, with an estimated 2.3% per annum increase since then.
- 15 It can therefore be inferred that the number of consumers requiring liquor store services has also increased by a similar rate since 2007 and the grant of this application would satisfy the service of increased and increasing requirements. This is a significant public interest factor.
- 16 It was submitted that the surveys undertaken on behalf of the applicant by Data Analysis Australia (“the DAA Report”) were properly constructed, independently conducted and objective, with the intercept survey and the telephone survey together providing a comprehensive and reliable source of evidence: 67% of each of the telephone and intercept respondents indicating that consumer choice and competition were their basis for support of the store.
- 17 Using the 67% expressed consumer support and the population figures in the Bodhi Report it may be inferred that in the order of 7,500 adults in the locality presently support the proposed store and 6,600 consumers of packaged liquor support the store.
- 18 It was submitted that Dr Henstridge from DAA has observed that the level of support for this store is ...*amongst the highest I have observed in similar surveys, with more than twice as many respondents to the telephone survey*

being in favour of the proposal than against, and more than three times as many in the intercept survey. These ratios are even higher if only residents of Secret harbour are considered'.

- 19 Of the reasons identified by consumers as the basis for their support of the store, consumer choice and competition predominates (76% of the telephone survey and 65% of the intercept survey), evidencing a clear consumer requirement for the proposed store in addition to (or notwithstanding) the existing package liquor outlets at the Centre.
- 20 It was submitted that the requirements of consumers are consistent with the planning objectives for centres such as the Centre, with the Bodhi expert evidence in this regard including the following:
 - a) the Centre is the highest order shopping centre in the locality. After the expansion is complete, it will be a triple supermarket based centre with 48 tenancies;
 - b) the Secret Harbour Town Centre is a District Centre and as such is to have a focus on servicing the daily and weekly needs of residents, and therefore contain services and facilities that reflect the particular needs of their catchment: the Secret Harbour Town Centre is the key activity node in the locality;
 - c) the Centre is a major element of the Secret Harbour Town Centre;
 - d) the Centre is of increasing regional importance, will facilitate comparison shopping, and it is reasonable for consumers to be allowed the opportunity to compare prices and products for liquor and food at a Centre of such importance; and
 - e) the store proposal is aligned with planning policy, and many residents are keen to have additional retail activity and increased shopper choice.
- 21 Convenience was another key factor stated by the survey respondents in supporting the grant of the application and this will be supported by the fact that the store will be situated such that it will offer convenient one-stop shopping for users of the carpark located at the south-east of the Centre, which, after the redevelopment, will be the largest carpark of the Centre.
- 22 With regard to public interest or issues, it was submitted that there is no evidence adverse to the grant of the application, with the following key conclusions of the Bodhi Report:
 - a) the local population is relatively affluent and is not considered at risk;
 - b) the locality has lower than usual levels of socio-economic disadvantage;

- c) alcohol related crime and ill health in the locality are lower than average;
 - d) the store is unlikely to significantly increase alcohol access or affordability; and
 - e) other negative impacts are considered unlikely.
- 23 Accordingly, there is little or no tension between competing objectives of the Act of the nature referred to in *Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258 at [19]* and accordingly there is no need for a weighing and balancing of the evidence.
- 24 Alternatively, to the extent that a weighing and balancing exercise is required, the weight of the public interest evidence in this case overwhelmingly favours the grant of the application. Applying the approach outlined in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*, the licensing authority should find:
- a) the existing level of alcohol-related harm and ill-health in the locality is low;
 - b) there is no evidence of any increase at all in the risk of harm from granting the application, much less a risk of alcohol-related harm increasing to an unacceptable level or resulting in undue harm or ill-health; and
 - c) the consumer requirement evidence and evidence of benefits to be provided by the store very clearly outweighs whatever minimal evidence there is relating to risk of harm.
- 25 In conclusion it was submitted that, on a proper construction of the Act and upon the evidence before it, the Commission should find that it is in the public interest to grant the application.

Submissions on behalf of the Director

- 26 It was submitted that the Director relies on the following factors which support the decision to refuse the application:
- a) the need to cater for the requirements of consumers for liquor and related services did not support the grant of the application because:
 - i) the “one-stop shopping” concept does not support the grant of the application;

- ii) convenience to customers does not support the grant of the application; and
 - iii) competition and choice for customers does not support the grant of the application;
 - b) the application did not facilitate the use and development of licensed facilities, reflecting the diversity of the requirements of consumers; and
 - c) the proposed licence is not consistent with the proper development of the liquor industry.
- 27 It was submitted that the primary contention put forward by the applicant was that, apart from the feature of an internal fitout that will increase consumer benefit which is not available in other liquor outlets, the store will be co-located with a Coles Supermarket allowing consumers to conduct one-stop shopping.
- 28 However, the concept of an ability to buy liquor and groceries should not be conflated with the concept of one-stop shopping. These are not synonymous concepts. One-stop shopping does not require that a consumer be able to purchase liquor and groceries from under the same roof or using the same trolley. Instead, all that is required is the ability to purchase liquor and groceries without being required to travel to more than one general location; that is, being able to shop in a single stop.
- 29 It was submitted that, in this case, it appears that the ability to undertake one-stop shopping already exists in the locality, because:
- a) the store is approximately 100 metres from an existing liquor store of the same kind, which provides similar products and services, and is also attached to a supermarket (namely the BWS store);
 - b) the store is approximately 200 metres from the existing Cellarbrations Drive-thru;
 - c) the store is approximately 1 kilometre from an existing liquor store; and
 - d) the store will now be located in the same shopping centre as a Dan Murphy's liquor store, as a consequence of the Director's decision.
- 30 Therefore, it is open to the Commission to conclude that the potential benefit to the public through the added convenience of one-stop shopping is diminished by the close proximity of the now four existing liquor outlets either in or within close proximity of the Centre.
- 31 It was further submitted that with regard to the applicant's submissions and evidence relating to the public benefit of the proposed store in providing added convenience for consumers, this is not in itself a persuasive factor in

demonstrating consumer requirement. As recently stated by the Commission in *Liquorland (Australia) Pty Ltd v Commissioner of Police (LC18/2015) [129]*:

A liquor outlet at every corner delicatessen or beside every supermarket or regularly visited retail outlet to satisfy the convenience of some members of the public is not what the community would countenance or expect, and would not be, in the Commission's view, in accordance with the provisions and intent of the Act.

- 32 Therefore it is open to the Commission to conclude that any convenience that would be provided to the public by the grant of the application is insufficient to demonstrate that the application is in the public interest.
- 33 With regard to competition and choice, it was submitted that the Director correctly concluded that the benefit to the community from the grant of the application was significantly diminished as the BWS store and the Cellarbrations Drive-thru, both already afford users of the Centre with the convenience of one-stop shopping and competition within the locality. This finding is now further reinforced by the grant of the Woolworths application which adds a Dan Murphy's outlet to the Centre.
- 34 Therefore it is open for the Commission to find that the locality has sufficient liquor outlets, namely four, to generate an appropriate level of choice and competition for liquor related services and outlets.
- 35 In summary, for the reasons stated, it is therefore open to the Commission to:
- a) adopt the same reasoning and reach the same conclusion as the Director; and
 - b) affirm the decision of the Director to refuse the application.

Determination

- 36 Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission have regard only to the material that was before the Director when making the decision.
- 37 On a review under section 25 of the Act, the Commission may -
- (a) *affirm, vary or quash the decision subject to the review; and*
 - (b) *make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and*

(c) *give directions –*

(i). *as to any question of law, reviewed; or*

(ii). *to the Director, to which effect shall be given; and*

(d) *make any incidental or ancillary order.*

38 In conducting a review under section 25 of the Act, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (*Hancock v Executive Director of Public Health [2008] WASC 224*).

39 Pursuant to section 38(2) of the Act, an applicant for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest.

40 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.

41 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*).

42 The Commission also notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”

43 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (*Palace Securities Ltd supra*).

- 44 The primary objects of the Act are:
- (a) *to regulate the sale, supply and consumption of liquor; and*
 - (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 of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*
- 45 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384 [32]*:
- “[Section] 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. 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 to make those objects the exclusive consideration nor the sole determinants of the public interest”.*
- 46 The applicant is seeking to open a Liquorland store immediately adjacent to the Coles supermarket to be developed at the Centre and has submitted that the application satisfies the primary and secondary objects of the Act (sections 5(1) and 5(2)) and that the grant of the application is in the public interest (section 38(2)).
- 47 The Commission notes that the key factors and benefits to the public from the grant of the application are stated by the applicant as being:
- 1) competition and consumer choice;
 - 2) convenience - “one stop shopping”;
 - 3) rapidly expanding population in the locality;
 - 4) no adverse public interest evidence or issues; and
 - 5) the weight of evidence from the DAA surveys that identifies a consumer requirement that will be addressed through the grant of the application.

- 48 In order to demonstrate a requirement on the part of consumers of liquor for the proposed store, the applicant has conducted two surveys, a telephone survey and an intercept survey, with 300 and 193 responses respectively.
- 49 The Director has submitted that the survey evidence contained in the DAA Report should be given limited, if any, weight, with the Commission having previously found that petitions, surveys and social media interactions have little probative value and should be treated with a degree of caution.
- 50 Whilst the Commission does always take a cautious approach to what is generally described as “objective” evidence provided by means of a prognostic nature, the fact remains that an applicant has few options in seeking to demonstrate that a consumer requirement exists to support the granting of the licence.
- 51 In previous decisions, the Commission has expressed reservations about the weight that may be applied to surveys. This has been because, among other reasons, the outcome of surveys is dependent upon the method of selection and sampling of respondents, the objectivity of the surveys and petitions, the type of questions asked, and the geographical and demographic composition and nature of the locality.
- 52 In this case, the applicant has submitted that the surveys were properly and independently constructed – both favourable and unfavourable comments were reported - and the questions were neutrally framed. The designer of the surveys and lead author of the DAA Report has been accepted as an expert in the field of applied statistics.
- 53 No evidence has been presented to suggest that the consultants engaged by the applicant (DAA and Bodhi), are not objective or qualified to reach their conclusions and no expert evidence contrary of their findings has been presented. The Commission has no reason to doubt the integrity, good conscience or objectivity of the consultants engaged by the applicant.
- 54 Therefore, the Commission accepts the outcomes which the survey results demonstrate in that consumers have a requirement for the proposed store notwithstanding the existing packaged liquor outlets in the locality.
- 55 The Director has made strong reference to the existing packaged liquor outlets in the locality, including the recently approved Dan Murphy’s Liquor Store that is being developed adjacent to the Centre outside of the main shopping complex, with the view that the requirements of consumers are already being met. It has been further submitted that a ‘proliferation’ of liquor outlets was identified in the second reading speech of the Act, as not being in the public interest.
- 56 The Commission observes that there is no reference in the Act to ‘proliferation’, but rather the legislation specifically abolished the “needs test” in favour of the

granting of a liquor licence being based on what is in the public interest. To apply a situation of 'proliferation' should this application be granted would be highly inconsistent with numerous instances all across the state of Western Australia where large shopping centres have competing liquor stores associated with major supermarkets.

57 Section 38(4) of the Act specifies those matters the licensing authority may have regard to in determining whether granting the application is in the public interest:

- a) the harm and 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.

58 The Director, in his decision (A000195551 paragraphs 44 and 45) has stated that the evidence establishes that:

- a) the locality does not experience elevated rates of alcohol-related crime;
- b) alcohol-related hospitalisations for the area are below the State rate;
- c) the socio-economic profile reflects a community which is relatively advantaged;
- d) the population in the locality has increased substantially in recent years and will continue to grow over the coming years.
- e) whilst there may be an overrepresentation of young people in the locality, there is no evidence of alcohol-associated problems with this particular demographic in the area.

59 Having regard to all the evidence before it, the Commission agrees with the above observations of the Director. Consequently, the Commission has no basis to find that the granting of this application is not in the public interest as no negative aspects of the application are apparent nor is there any evidence contrary to that provided by the applicant that demonstrates a consumer demand for the proposed facilities and services – refer *Woolworths v Director of Liquor Licensing [2013] WASCA 227 at (7 & 8)*.

- 60 The question then remains as to whether the granting of this application will be in accordance with the proper development of the liquor industry.
- 61 It is a notorious fact that large shopping centres of this nature (in this instance classified as a District Centre) generally contains competing liquor stores associated with the larger supermarket outlets (Cole, Woolworths, IGA and Aldi). There are enough examples of the juxtaposition of such liquor stores State-wide to evidence the fact that the licensing authority has recognised (subject to satisfying the public interest requirements) this trend as being in accordance with the proper development of the liquor industry.
- 62 Whilst Commission is cognizant of its observations in LC 28/2015 (refer paragraph 31) this application is to be determined having particular regard to the nature of locality being a District Centre. This is a significant factor in the Commission's consideration of this application, as is the expected high level of consumer numbers forecast to be weekly shoppers at the associated Coles Supermarket.
- 63 Increased choice, competition and the convenience of one-stop shopping are all factors that contribute to the association between large supermarkets and their branded liquor stores in large shopping centres. As pointed out by the applicant, the convenience of one-stop shopping was referred to by Buzz JA in *Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227 at (78)*:
- “...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 the district and regional shopping centres”*
- 64 Having regard to the totality of the evidence, the submissions of the parties and the application of the relevant legislative provisions, the Commission is satisfied that the application is in the public interest.
- 65 The decision of the Director is quashed and the application is approved.



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