

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr David Payne
(assisted by Mr John David, friend)

Respondent: Proce Pty Ltd/Woolworths Limited
(represented by Mr G Crocket, GD Crocket & Co)

Premises: "Beer Wine Spirits (BWS)"
Shop 4-5 Cambridge Street Shopping Centre
115 Cambridge Street
West Leederville

Commission: Mr E.J. Watling
Ms H Cogan
Mr G Joyce

Matter: Application for Review, Section 25 of the *Liquor Control Act 1988* ("the Act")

Date of Hearing: 25 September 2008
Date of Determination: 13 October 2008

Additional material tendered to the Commission at the Hearing:

1. Town of Cambridge Council Report (DES04.138) dated 24 August 2004.

Authorities referred to by the Respondent:

- Scurr v City Council of Brisbane, 1973 133 CLR at 242 Stephen J at page 256
- Tasker v Fullwood [1978] NSWLR20; and Statutory Interpretation in Australia: 5th Edition D. C. Pearce/RS Geddes (paragraph 11.27 page 288)
- RE Mc Henry and Judge Sharkey 1987 [4 SR (WA)] page 31 at pages 46-48
- Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207.

BACKGROUND

On 7 April 2008 an application was lodged on behalf of Proce Pty Ltd for the conditional removal of a liquor store license from premises situated at 278 Railway Parade, West Leederville (trading as Barossa Cellars) to premises situated at Shop 4-5 Cambridge Street Shopping Centre, 115 Cambridge Street, West Leederville (the new premises).

Also lodged on the same date was a copy of an Agreement for Purchase of Business between Proce Pty Ltd as trustee for the Barossa Cellars Trust (Seller) and Woolworths

Limited (Buyer). Woolworths was to trade as Beer Wine Spirits (BWS), West Leederville at the new premises.

In accordance with section 67 of the Act, the application was advertised on the site of the premises for a period of 28 days commencing on 9 April 2008, in The West Australian newspaper and by way of a Notice to Residents and Businesses located within a 200 metre radius of the premises.

On 6 May 2008 an objection to the conditional removal of the license was lodged by Mr David L Payne, 19 Kimberley Street West Leederville. The grounds of the objection were:

1. "It will cause annoyance, disturbance and inconvenience to our family life."
2. "There will be a negative impact on the amenity, quiet or good order of the area in the vicinity of our home."

The objection further stated:

"It is therefore proposed that the license be granted on the basis that privacy screening be erected along the eastern boundary of the car park."

The objection was in accordance with section 74(1)(g) of the Act.

The grounds of the objection were based on the use of the Cambridge Street level car park, which has an elevated view into the rear of the property at 19 Kimberley Street, by patrons of the BWS liquor store, particularly during extended trading hours beyond 6.00pm.

On 13 June 2008 the Director of Liquor Licensing, in accordance with sections 13 and 16 of the Act, made a determination of the application on the written submissions of the applicant and the objector.

The determination granted the application by Woolworths Limited and dismissed the objection by Mr D Payne.

The determination contained the following observations:

"After considering the Public Interest Assessment (PIA) provided by the applicant, I am satisfied that, on the balance of probabilities, the applicant has adequately addressed the provisions set out in section 38(4) of the Act".

and

"...I am of the opinion that the burden of proof on the objector under section 73(10) has not been discharged satisfactorily and therefore, the grounds of the objection have not been made out".

On 11 July 2008, Mr David Payne lodged an Application for Review of the Decision of the Director of Liquor Licensing. The Application for Review was referred to a hearing of the Liquor Commission of Western Australia, held 25 September 2008.

THE HEARING

Before inviting the submissions of each party, the Commission acknowledged the Respondent licensees written submission that "the members of the Commission are without power to hear or determine this review because the nature and scope of the Act prevent the Commission challenging "*findings of fact*" pursuant to the provisions of section 25(3)(b)".

The Commission, having considered this view, was of the opinion that the Application for Review was based on more than the suitability of premises as prescribed by section 25(3)(b) of the Act and was adequately covered by section 74(1)(g) which incorporated such issues as annoyance, disturbance or the lessening of the amenity, quiet or good order of the locality.

It was considered appropriate that the Commission should hear and determine the application.

APPLICANT'S SUBMISSION

Mr David, assisting Mr Payne, spoke to the Application for Review, emphasising the negative impact on Mr Payne's family life due to the liquor store patrons use of the Cambridge Street level car park after 6.00pm.

Mr David presented photographs of the car park area in use, however, these were accepted by the Commission only in the context of location in relation to the property at 19 Kimberley Street, West Leederville. Car park activities featured in the photograph were not taken into consideration as this represented new material not admissible under section 25(2c) of the Act.

Mr David presented a copy of the Town of Cambridge Council Report (DES04.138) dated 24 August 2004, on the basis that the document reflected the fact that Council always intended for the basement and first level car parks not to be accessible after normal trading hours i.e. after 6.00pm. This meant, that the only off-road car parking available to the liquor store patrons after 6.00pm was the Cambridge Street level car park with an elevated view into Mr Payne's property.

Mr David contended, that as it was not initially intended that a liquor store be part of the shopping complex, the car park planning was inadequate for this eventual retail addition.

Mr David confirmed that Mr Payne had no objection to the granting of the liquor license itself, but sought the installation of privacy screening from the Cambridge Street level car park, as a condition of that license.

RESPONDENT'S SUBMISSION

Mr Crocket, in presenting the submission on behalf of the Respondent made the following points (selected extracts):

- A legal determination in the case of Hackney Tavern Nominees Pty Ltd v McLeod, referred to in the case McHenry and Judge Sharkey, held the word “unduly” “must be qualified by the nature of the neighbourhood”. This was relevant to the Application for Review under section 76(1)(g) as it was quite clear from all of the reports and information applied to granting the license that West Leederville along Cambridge Street is a busy neighbourhood. Residents of this section of Leederville are expected to be tolerant and accept a degree of disturbance and inconvenience. The factual findings of the level of disturbance, is insignificant and certainly not undue in this neighbourhood.
- The Directors decision was based on a number of documents including:
 - The PIA;
 - The MGA Town Planning Report;
 - A schedule of data and statistical analysis of the location;
 - The Caporn Services – Environmental and Health Report;

and therefore is soundly based.

- The suggestion the retail liquor store is a “change of use” is simply incorrect. Liquor stores are regarded as a retail use (no different from a supermarket, a pharmacy, a deli etc.).
- The review fails to identify any aspect of the evidence in which the decision maker has erred.

FINDINGS

Having heard the parties and considering all of the material that was before the Director when making the decision, the Commission is satisfied that no cause exists to vary or quash the decision of the delegate to the Director of Liquor Licensing.

The Decision of the Director to grant a liquor store license for the premises at Shop 4-5 Cambridge Street Shopping Centre, 115 Cambridge Street, West Leederville stands.

In reaching this determination, the Commission is cognizant that circumstances in relation to Mr Payne’s position may be able to be supported by more evidence than has been available to the Commission.

If so, the option remains available for Mr Payne to lodge a complaint with the Director under section 117 of the Act, “*Complaints about noise or behaviour related to licensed premises*”.

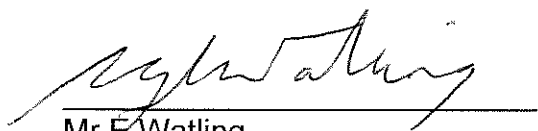
In fact, the Commission considers that there has been a process deficiency in that this matter reached the point of a hearing when there was a more appropriate option available under section 117 of the Act, which may have provided the opportunity to resolve the matter in accordance with subsection 3(a) -

- (3a) When a complaint is lodged with the Director under subsection (1), the Director is to attempt to settle the matter by conciliation or negotiation.

It would appear that the lack of legal advice and/or the availability of guidance at the point that the Application for Review was lodged, has led to a hearing that may have otherwise been avoided.

COSTS

There is no order as to costs.



Mr E Watling