

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

- Applicant:** Woolworths Limited
(represented by Mr Henry Jackson instructed by Ms Catriona McLeod and Ms Susan Nicholson Cullen Babington Macleod Lawyers)
- Objectors in Attendance:** Orebo Pty Ltd – Licensee of Manjimup Hotel and Cellarbrations Manjimup
(represented by Mr Ashley Wilson of Frichot & Frichot Lawyers)
- The Warren Blackwood Emergency Accommodation Centre
(represented by Ms Jillian Walker)
- Ms Mary Elizabeth Nixon
- Ms Jillian Dorothy Walker
- Commission:** Mr Eddie Watling (Acting Chairperson)
Mr Evan Shackleton (Member)
Ms Helen Cogan (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 Woolworths Supermarket, Manjimup.
- Date of Hearing:** 28 November, 2013
- Date of Determination:** 26 March 2014
- Determination:** The application is granted and the decision of the Delegate of the Director of Liquor Licensing is quashed.

Authorities referred to in the determination:

- *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
- Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]:
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258).

Background

1. On 26 July 2012, an application was lodged by Woolworths Limited (“the applicant”) for the conditional grant of a liquor store licence in respect of premises to be known as Woolworths Supermarket Manjimup and located at the corner of Mottram Street and Ralston Street, Manjimup. The application was made pursuant to section 47 and 62 of the *Liquor Control Act 1988* (“the Act”).
2. Objections to the grant of the application were lodged by the following:
 - a. Orebo Pty Ltd – licensee of Manjimup Hotel and Cellarbrations Manjimup (*represented by Mr Ashley Wilson of Frichot & Frichot*)
 - b. Statewide Resources Pty Ltd – licensee of Manjimup Gateway Motel (*represented by Canford Hospitality Consultants Pty Ltd*)
 - c. Ventorin Pty Ltd – licensee of Pemberton Cellars (*represented by Canford Hospitality Consultants Pty Ltd*)
 - d. The Country Women’s Association of Western Australia (Inc.)
 - e. Dawn Lorraine Hargrave
 - f. Kevin and Shirley Needs
 - g. The Seventh-Day Adventist Church
 - h. The Manjimup Regions Family Domestic Violence and Education Support Group Inc.
 - i. The Warren Blackwood Emergency Accommodation Centre
 - j. Ms Mary Elizabeth Nixon
 - k. Ms Jillian Dorothy Walker
3. Pursuant to sections 13 and 16 of the Act, the Delegate of the Director of Liquor Licensing (“the Director”) determined the application on the papers.
4. On 8 August 2013, the Director refused the application.
5. On 9 September 2013, the applicant lodged an application for review of the decision of the Director, pursuant to section 25 of the Act.
6. A hearing before the Commission was held on 28 November 2013.

Submissions on behalf of the applicant

7. The applicant wishes to operate a liquor store of approximately 156m² retail floor space within a Woolworths Supermarket at a new shopping centre in Manjimup, situated on the corner of Mottram and Ralston Streets.
8. The new supermarket will have floor space of 3,180m² in total and will replace the existing Woolworths supermarket (1110m²) in Manjimup, which is located on Brockman Street. The new supermarket is expected to attract larger numbers than the existing supermarket, which attracts approximately 300,000 people per annum.
9. The liquor store will have a very large selection of products, and will provide convenience to those consumers who wish to take advantage of “one stop” shopping and thereby be able to purchase their groceries and packaged liquor at the same place. The “one stop” shopping convenience will be buttressed by car parking facilities for 200 vehicles.
10. The applicant submitted a Public Interest Assessment as well as numerous other supporting materials, including:
 - a. *Public Interest Assessment Health and Environment Report* prepared by Caporn Services (“Caporn Report”)
 - b. *Liquor licensing Mottram Street and Ralston Street Manjimup Report* prepared by MGA Town Planners (“MGA Report”);
 - c. Numerous witness statements
 - d. Manjimup Market Research Analysis
 - e. A “Secret Shopper” report.
11. Other documentation submitted in support of the application included:
 - a. Floor Plan of the supermarket and proposed premises
 - b. Details of Woolworths Contribution to Community Programmes in Western Australia
 - c. Harm Minimisation Documents
 - d. Locality map
 - e. Socio-Demographic Profile of the Locality

12. The applicant submitted a "Petition Register" of almost 400 customers, compiled over a 2-month period (representing almost 10% of the population of Manjimup) supporting the application.
13. The applicant also provided results from a survey questionnaire, which was filled out by people who live in or frequent the locality. 90% of the 30 submitted questionnaires indicated that the participants were dissatisfied with the current provision of liquor and service from existing licensed premises in the area and 93% indicated that they would shop at the proposed liquor store. All of the participants in the survey stated that the proposed liquor store would be convenient for them.
14. Demographic and social health and crime indicators for the locality were provided by the applicant, the key aspects being:
 - a. in 2011 (the year of the most recently published census), 4293 people lived within the locality, with the population increasing 1.3% from 2006 to 2011. The current estimated population in the locality is 4,300 people;
 - b. overall, the population of the locality has a higher proportion of minors (22.9% for the locality compared with 19.7% for WA and 21.1% for country WA) as well as a higher proportion of population aged over 60 years of age than the state average (21.4% for the locality compared with 12.7% for WA and 17.1% for country WA);
 - c. the proportion of indigenous persons is low for a country area (4.0% for the locality compared to 3.1% for WA and 8.3% for country WA);
 - d. on a per capita basis, the crime rate in the Shire of Manjimup is lower than WA rates for offences of assault, dwelling burglaries, graffiti, robberies and car thefts; and about the same level for offences relating to other burglaries;
 - e. statistically the rate of alcohol related hospitalisations in the Shire of Manjimup (which comprises an area much bigger than the locality) is higher than WA. Nonetheless no data was available stating if the

alcohol related hospitalisations occurred primarily in or outside the locality;

f. apparently alcohol consumption in the Shire of Manjimup is slightly higher than the WA rate (173.7 litres per person for the LGA compared to 172.6 litres per person for WA). There is no commentary from the source of this data as to whether this higher level of consumption has a direct influence on higher levels of alcohol related harm and ill-health;

g. on behalf of the applicant, Caporn Services completed comprehensive field and site investigations to assess what, if any, liquor related issues existed in the locality. There was no report of observing or identifying any drinking or congregation areas for any “sensitive” group in or near the proposed premises.

15. The applicant undertook consultation with local stakeholders such as the police; the local government authority; hospital; and Department of Child Protection with no concerns being expressed by these stakeholders in respect of the application.

16. It was submitted that none of the existing liquor outlets in Manjimup have a close association with a major supermarket and the proposed liquor store will provide the convenience of one stop shopping for customers of the new supermarket and shopping centre.

17. It was submitted that a primary object of the Act is to minimise, not eliminate harm and the proper development of the liquor industry is also a key factor to be considered under the objects.

18. The applicant questioned a number of the statistics submitted by the objectors pointing out that in some cases they were not based on data specific to Manjimup.

19. In lodging the application for a review of the decision of the Director to refuse a conditional grant for a liquor store licence, fourteen (14) grounds for the application were submitted. The grounds generally being that the Delegate

of the Director of Liquor Licensing erred in law and reached incorrect findings in respect to the material before him when making the decision.

20. Reference was made to several conclusions reached by the Delegate of the Director of Liquor Licensing that he later relied upon to the effect that:

- a. there are existing levels of alcohol related harm in Manjimup;
- b. the socio-demographic profile of the area is relatively disadvantaged;
and
- c. there are some 'at-risk groups' present in the community.

21. The Director found that there was a "conflict" between the object of harm minimisation (section 5(1)(b)) and catering for the requirement of consumers (section 5(1)(c)).

22. The Director stated (para 37) that he did not accept that Woolworths "harm minimisation strategies will fully mitigate the potential risks for an increase in alcohol related harm in the area". In doing so he expressly referred to consideration of the impact of the grant of the licence extending "well beyond" what "may happen" at the licensed premises itself.

23. The applicant submitted by way of summary that:

- a. the factual basis for many of the conclusions reached by the Director is uncertain at best, and at worst, absent;
- b. there is no basis for any conclusion other than the level of alcohol related harm in Manjimup is consistent with that tolerated within the community;
- c. regardless of existing levels of alcohol related harm, there is nothing before the Commission to allow it to conclude that the application, if granted, would lead to an increase in such harm – there is no nexus with the application;
- d. even if that were not the case, the benefits of the application (catering for the requirements of the community and the development of the liquor industry) outweigh any detriment.

24. With regard to the primary object of the Act to cater for the requirement of consumers, the applicant referred to a number of authorities that would support the application and the fact that the Director, in his decision found (paragraph 24) that he was satisfied that “the grant of the application would be promoting object 5 (1)(c) of the Act.
25. Considerable comment was submitted in relation to conclusions reached by the Director relating to harm and ill-health issues associated with the application. Those conclusions were reached on the basis of the materials relied upon by the objectors.
26. Regarding the position taken by the licensee objectors as to the presence of existing high levels of alcohol related harm and ill-health, this is both obviously self-serving and hypocritical.
27. The self-serving nature of the licensee objectors claims also ought to be acknowledged when considering assertions that the premises will be adjacent to sensitive premises, by which reference is made to the offices of the Department of Child Protection. There is nothing in the material relied upon that provides evidence that the office is, in fact, used by anyone other than departmental staff.
28. Regarding the concerns of other objectors, while no doubt legitimately held, are largely expressed as generalised concerns about the impact of alcohol on health in the community.
29. Data submitted by the objectors with respect to the effects of alcohol on the Manjimup community was closely analysed and was submitted as being inconclusive, general in nature, marginal in its findings and/or lacking a nexus between the grant of the proposed licence and the advent of alcohol related harm.
30. It was submitted that there is no factual basis for a finding that the level of alcohol related harm in Manjimup is significantly higher than that commonly accepted in the community, nor is there a factual basis for finding the application would, if granted, result in an increase in alcohol related harm.

31. To the extent that there is a risk that the application will, if granted, result in an increase in alcohol related harm and ill-health, it is necessary for the Commission to weigh the benefits of the proposal against its conclusions as to the likelihood and extent of that alcohol related harm or ill-health.
32. In the light of preceding submissions, it is submitted that the benefits of the proposal outweighs any such risks and the grant of the application is therefore in the public interest.

Submissions on behalf of the Objectors

33. The objectors comprised licensee objectors, incorporated groups and individual objectors.
34. The objectors submitted that Manjimup already suffers from alcohol-related harm and that the granting of the application could only serve to increase the harm by making liquor more readily available.
35. The grounds of objection lodged by the licensee objectors were in accordance with section 74(1)(a), 74(1)(b), 74(1)(g) and 74(1)(j) of the Act and drew on data presented in a number of reports relating to alcohol related harms and the influence of outlet density on the sale and consumption of alcohol.
36. Specific reference was made to statistical data included in the publications:
- a. *Impact of Alcohol on the Population of Western Australia – Regional Profile: South West Region (Nov 2011), Drug and Alcohol Office Surveillance Report; and*
 - b. *Community Safety and Crime Prevention Profile for the Shire of Manjimup (2009-2010)* indicating evidence of existing levels of alcohol related harm and ill-health occurring in the community within the locality and immediate surrounding areas.
37. Data was placed before the Commission that indicated the following:
- on a per capita basis, the crime rate in the Shire of Manjimup is lower than the State rate for offences of assault, dwelling burglaries, graffiti,

robberies and car thefts; and about the same level for offences relating to other burglaries;

- in 2009 – 2010, alcohol was a factor in 56% of assaults recorded in the Shire of Manjimup, which was higher than the South West (42.9%) and the State rate (45.2%);
- between 1995 and 2004, the South West region recorded 24.8% of fatal crashes and 12.8% of serious crashes involving a driver with a BAC of 0.05g/100mL or above. In the Shire of Manjimup there were 1,525 road crashes during the period of 1994 – 2004, of which 173 (11.3%) were serious crashes;
- from 2002 to 2006, the rate of alcohol-related hospitalisations in the Shire of Manjimup (SSR is 1.29) was higher than the State rate (SSR is 1);
- there was a 20% increase in the number of people with Family Domestic Violence issues and an increase in the number of children amongst the Warren Blackwood Emergency Accommodation Centre clients.

38. The objectors compared the number of alcohol-related offences in 2011 in Manjimup compared to other areas per 1000 population with the following results:

i. Manjimup	9.1
ii. Margaret River	5.4
iii. Dunsborough	6.7
iv. Collie	13.9
v. Donnybrook	7.9
vi. Kojonup	6.8
vii. Bridgetown	3.3
viii. Pemberton	8.9
ix. Nannup	1.0
x. Denmark	7.0
xi. Augusta	6.2
xii. Capel	4.1

- xiii. Cranbrook 7.5
- xiv. WA 7.7

39. It was also submitted that the placement of the liquor store next to the supermarket would place higher temptation on at risk groups, and might “normalise” the purchasing of alcohol by providing it next to the purchase of food and other grocery items.

40. The Town of Manjimup was suitably serviced by the 3 licensed premises selling packaged liquor and already in operation. Those are Cellarbrations Liquor Store, the Drive-through as part of the Manjimup Hotel and the Southern Forrest Hotel Motel.

41. Submissions from the incorporated groups and individual objectors were generally based on section 74(1)(a) and 74(1)(b) of the Act:

- a. that the grant of the application would not be in the public interest;*
- b. that the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor.*

42. Ms Mary Nixon and Ms Jillian Walker who attended the hearing (Ms Walker also representing the Warren Blackwood Emergency Accommodation Centre) submitted considerable material to demonstrate their concerns as to the effects of alcohol on communities in general and on Manjimup in particular.

43. Concern was expressed at to the “normalisation” of alcohol by being directly associated with grocery shopping and the potential impact on “at risk” groups in what is a low socio-economic area. Ms Mary Nixon also presented data from a number of studies relating to alcohol related harm and the influence of outlet density on the sale and consumption of alcohol.

44. Ms Walker, individually and on behalf of the Warren Blackwood Emergency Accommodation Centre (WBEAC) expressed concerns and presented data relating to existing difficulties in Manjimup with rising family violence and the increase of the percentage of children amongst WBEAC clients.

45. It was submitted that an increase in the availability of alcohol is a factor in increasing consumption and cheaper alcohol prices would increase the risk factor contributing to family domestic violence.

Determination

46. Pursuant to section 25(2c) of the Act, when considering a review of the decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.

47. On a review under section 25 of the Act, the Commission may –

- *affirm, vary or quash the decision subject to the review;*
- *take a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance;*
- *give directions –*
- *as to any question of law reviewed; or*
- *to the Director, to which effect shall be given; and*
- *make any incidental or ancillary order.*

48. In conducting a review under section 25, 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 (refer *Hancock v Executive Director of Public Health [2008] WASC 224*).

49. 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.

50. 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.

51. Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgement 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). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:

- i. *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.*
- ii. *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.”*

52. Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd supra*). The primary objects of the Act are:

- i. to regulate the sale, supply and consumption of liquor; and
- ii. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- iii. 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.

53. 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]:

- i. “[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”.

54. Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WACA 258*).

55. By virtue of decision number A222830 the Director refused the application for the conditional grant of a liquor store licence for the premises Woolworths Manjimup.

56. The application is for a moderate sized liquor store (156m² retail floor space) within a new Woolworths supermarket (floor space of 3,180m² in total) providing a range of specialty shops and other services so enabling consumers to purchase their packaged liquor at the same time as doing their grocery and other shopping.

57. In support of the application the applicant has provided a petition signed by approximately 400 people together with 30 questionnaires completed by community members.

58. Currently there are five (5) existing liquor licences within the locality capable of selling packaged liquor. Three are commercial licences and two are sporting clubs that are restricted to selling packaged liquor to members only.

59. The Commission has considered the material submitted by the applicant, including the Public Interest Assessment, the Caporn Report and the MGA report and is satisfied that the granting of the application would be consistent with object 5(1)(c) of the Act:

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.

60. This position does, however, need to be balanced with object 5(1)(b) of the Act:

to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.

61. The primary case of the objectors is the potential harm and ill-health impacts that the granting of this licence will cause. Considerable data has been presented to demonstrate that there is existing alcohol harm and ill-health in the locality and that an additional packaged liquor outlet will only exacerbate the situation.

62. Whilst the Commission is mindful of the possible vested commercial interests of the licensee objectors these objections must be dealt with on their merits and in association with those lodged by the incorporated groups and individuals.

63. Whilst the data put forward relating to harm and ill-health in the Manjimup locality does indicate valid concerns for the current position and possible trends, the actual rates of difference with Statewide data are generally marginal and, as observed by the applicant, in many instances are not specific to the locality, but rather a wider area of influence.

64. The Commission finds it difficult to accept that the statistical data referred to by the objectors, and presented in the report "Impact of Alcohol on the Population of Western Australia", can be specifically applied to demonstrate a nexus between higher alcohol-related hospitalisations and the number of packaged liquor outlets in the Manjimup locality.

65. The data referred to is collected from regional or statistical local areas and goes beyond the defined locality of this application. The Shire of Manjimup has a population of just under 10,000, with the data of the report (Table 27 and appendix 18) showing a Standard Rate Ratio (SRR) of 1.29 for alcohol-related hospitalisations, compared to a SRR of 1.00 for the State.
66. As a comparison, Busselton with a population of around 32,000 has a SRR of 0.92 and Bunbury with a population of 45,000 has a SRR of 0.96. Both these local authorities also experience high annual visitation numbers that considerably add to the resident population. The significance of these figures is that Busselton has 10 commercial packaged liquor outlets and Bunbury 18 representing one for each 2,500 in population in Bunbury and 3,200 in Busselton.
67. Manjimup currently has one commercial packaged liquor store to 3,333 population, which will change to one packaged liquor store to 2,500 population if this application is approved. This is not inconsistent with the outlet density of Bunbury and Busselton, yet the SRR data differs considerably.
68. Accordingly, whilst recognising that Manjimup has a high SRR compared to many South West Regional Centres, the objectors have not demonstrated to the Commission that there is a sufficient nexus between the packaged liquor outlets of the locality and the SRR, and that this rate would appear to be influenced by other factors.
69. The data placed before the Commission in relation to crime rates including assaults, serious crashes and alcohol related hospitalisations, relates to the Shire of Manjimup, not the Town of Manjimup, and on that basis, it only provides statistical evidence with respect to that of the Shire, not the Town.
70. A similar approach has to be adopted in relation to the increase in admissions to the Warren Blackwood Emergency Accommodation Centre.
71. None-the-less, the Commission must consider the likelihood of harm and ill-health being caused by the grant of the application and is well aware of the academic research and reports that address the issues of outlet density and alcohol related harms.

72. In doing so, the Commission is not persuaded that the locality of Manjimup will be subject to an unacceptable level of increase in alcohol related harm and ill-health as a consequence of the granting of this application.
73. The size of the liquor store is small in nature and will become a component of a larger shopping precinct. The Commission has on a number of occasions acknowledged the responsible management practices of the applicant in liquor store operation and has generally accepted the consumer benefits of “one stop” shopping in relation to liquor stores being in proximity to a supermarket.
74. The suggestion that such shopping linkages contribute to the “normalisation” of alcohol products has not been supported by research data either in this instance or in submissions relating to other applications. The concept of “normalisation” is one regularly suggested by objectors and whilst the sentiments of the argument are recognised there is no evidence before the Commission that the “one-stop” shop approach increases the harm and ill-health aspects associated with the sale and consumption of alcohol.
75. The Commission finds that the evidence submitted in support of the grant does satisfy the public interest test. On assessing the evidence before it, the Commission finds that the benefit in increased competition, range of products and diversity of choice outweighs the potential harm that may result from the grant of the application. The Commission also finds that the objections to the application have not been made out.
76. Accordingly, the decision of the Director refusing the application for the conditional grant of a liquor store licence is quashed and the application is conditionally granted subject to the standard conditions imposed by the Director.



EDDIE WATLING
ACTING CHAIRPERSON