

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Upper Reach Pty Ltd
(represented by Ms Jessica Patterson of Lavan Legal)
- First Intervener:** Commissioner of Police
(represented by Ms Gillian Bailey of State Solicitor's Office)
- Second Intervener:** Director of Liquor Licensing
(represented by Ms Gillian Bailey of State Solicitor's Office)
- Commission:** Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Mr Eric Isaachsen (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act, 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to refuse an application to grant of a special facility licence (tourism).
- Premises:** Shop 5, Fremantle Markets, 74 South Terrace, Fremantle
- Date of Determination:** 18 August 2014
(on papers)
- Determination:** The application is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in the determination:

- *Woolworths Ltd v Commissioner of Police (LC 12/2013)*
- *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*

Background

1. The applicant operates Upper Reach Vineyard at 77 Memorial Avenue Baskerville in the Swan Valley under producers licence 6130045385.
2. On 9 September 2013 the applicant lodged an application for the conditional grant of a special facility licence – tourism in respect of small premises at Shop 5 Fremantle Markets, 74 South Terrace, Fremantle to be operated as a cellar door type facility where Upper Reach wines are to be made available for sale, supply and tastings (not supplied free). The application was made pursuant to sections 46 and 62 of the *Liquor Control Act 1988* (“the Act”).
3. On 22 October 2013, the Commissioner of Police (“the Police”) lodged a notice of intervention pursuant to section 69(6) of the Act.
4. The applicant complied with all statutory requirements and lodged all necessary and required documentation in relation to the application including a Public Interest Assessment (“PIA”) and a Supplementary PIA.
5. On 5 March 2014, the delegate of the Director of Liquor Licensing (“the Director”) determined the application on the papers and refused the application.
6. On 4 April 2014, the applicant lodged an application with the Liquor Commission (“the Commission”) for a review of the decision of the Director pursuant to section 25 of the Act and at the request of the applicant the Commission has determined this matter on the papers.
7. On 8 April 2014, the Director lodged a notice of intervention in the review proceedings pursuant to section 69(11) of the Act.

Preliminary issue

8. Following submissions by the applicant and the interveners concerning an application to admit further evidence to the Commission which evidence consisted of questionnaires allegedly lodged by the applicant but which were apparently not before the Director when he made the decision the applicant, the interveners and the applicant agreed that the Commission in considering the application for review would not be required to have any regard to these questionnaires lodged by the applicant on 12 May 2014 and would be required to consider only the 43 questionnaires which were before the Director when the decision was made.

Applicant's Submissions

9. The applicant wishes to operate from a small (24 sqm) shop (shop 5) in Fremantle Markets at 74 South Terrace, Fremantle under the trading name "Upper Reach." Shop 5 has direct access onto South Terrace and also directly into the Fremantle Markets.
10. The applicant's PIA and Supplementary PIA addresses the matters set out in section 38(4) of the Act and contains demographic and social health data for the locality in which the proposed premises will be situated.
11. The applicant submitted a public questionnaire, a market survey and various letters of support for the application.
12. The applicant intends to offer a quality wine appreciation and interpretive centre in Fremantle as a satellite offering to complement all WA wine producers including the applicant's Upper Reach winery in the Swan Valley. The small centre will provide a wine appreciation experience and education about wine, winemaking and grape growing processes for tourists to Western Australia.
13. Upper Reach Wines are in great demand by a wide section of the public including a large number of tourists. However, there is unmet demand due to the limitations of just the one Swan Valley premises, particularly in terms of catering for tourists who cannot access or do not have time to visit the Swan Valley premises.
14. This application is designed to address the issue of access for tourists and to promote the State's wine industry by replicating in Fremantle the quality cellar door facility which has won awards at the Swan Valley premises (Upper Reach was the winner of the "Best Cellar Door" award in 2013).
15. The applicant's intention is to introduce Upper Reach, WA's wine regions and boutique, family operated winemaking to tourists new to these experiences. The core of the offering will be authenticity, service, regional produce, wine appreciation and knowledge. The proposed operation is very small in size and limited in nature. There will only be approximately 6 white wines, 6 red wines and two fortified wines on offer.
16. Upper Reach Fremantle will become a significant attraction in its own right for tourists as well as enhancing both Fremantle as a tourism destination and WA's wine regions. The outlet will act as a gateway or sign post for the State's wine regions. Visitors will enjoy the experience of an individual, personalised wine appreciation and education experience from a boutique winery and (it's) handmade wines at a very convenient location.
17. The applicant set out details of the history of the Fremantle Markets, a very well known destination, as a leading local and tourist attraction which reflects Fremantle's multicultural and migrant history and which has everything from

local produce, organic goods, artisan and indigenous wares, music events and performances housed under one roof. The Fremantle Markets building is listed on the Register of Heritage Places and approval of this application will significantly contribute toward transforming this piece of South Terrace and improve the attraction of the Fremantle Markets.

18. Through offering wine appreciation, education and interpretation directly through the existing winery cellar door and in the proposed Fremantle Markets appreciation and interpretive centre, Upper Reach engages directly with the wine tourist, enthusiast and novice in a way that is not possible through conventional retail outlets.
19. Upper Reach proposes to offer a small and intimate, low impact, low risk, quality wine appreciation and interpretive experience in Fremantle.
20. The Upper Reach wine appreciation and interpretation experience will be in an existing urban tourism precinct (Fremantle) and will be run in tandem with the Upper Reach Swan Valley winery directly working together to cross promote and complement each other.
21. Private wine tasting and appreciation courses will be offered to tour operators for their tourist customers – events will be tailor made for each groups specific needs and the applicant will work with both the tour operators who have provided letters of support and others to develop and arrange itineraries, programs, courses and bookings for tour groups.
22. Maps, brochures and tourist information about all of WA's wine regions will be available and Upper Reach Fremantle is intended to act as an introduction to and representative sample of the Western Australian wine industry generally, it will promote the whole industry.
23. Tourists will be able to purchase their favourite Upper Reach wines to take home.
24. Examples were given of what were said to be successful, comparable experiences with those to be offered by the applicant, namely those operating in Italy, France, Spain and Germany.
25. Upper Reach's existing Swan Valley cellar door, winery and vineyard are a wine tourism business and totally different from that of a conventional liquor store. The Fremantle premises will be an extension of that existing tourism business.
26. The premises will only offer for take away sale or sample tasting wines produced by Upper Reach in its own winery and there will be no other alcoholic beverages available (including traditionally 'problematic' drink types such as canned beer, cheap spirits or pre-mixed drinks). This will significantly contribute to harm minimisation.

27. The proposed Upper Reach facility at Fremantle Markets will be of great benefit to tourists, it will provide a far more personal and educational approach to the purchase of locally made wine at a much more readily accessible location – it will offer the charm and tastings of a winery experience without the travel.
28. The proposed opening hours for Upper Reach in Fremantle are:
- | | |
|-----------|------------|
| Monday | 10am – 9pm |
| Tuesday | 10am – 9pm |
| Wednesday | 10am – 9pm |
| Thursday | 10am – 9pm |
| Friday | 9am – 9pm |
| Saturday | 9am – 9pm |
| Sunday | 9am – 9pm |
- Public holidays 9am – 6pm (excluding Christmas Day, Good Friday and before 12 noon on Anzac Day).
29. The Fremantle Markets main opening hours are:
- | | |
|------------------------|-----------|
| Friday | 9am – 8pm |
| Saturday
and Sunday | 9am – 6pm |
30. Upper Reach's proposed premises have direct access for the public providing a seven day attraction for Fremantle and Perth's tourists. The applicant intends to operate a low impact, low risk, quality wine appreciation and interpretation centre that will be very small in size and limited in nature with the following major characteristics:
- Only wine produced by the applicant can be sold for consumption on and off the premises.
 - Consumption on the premises is restricted to tasting samples of the applicant's wines.
 - No more than 20 patrons will be served tastings at one time.
 - Packaged liquor may be sold only in sealed containers for consumption off the premises.
31. The applicant's sole director is an astute licensee with a proven ability to minimise harm at the applicant's premises in the Swan Valley and will be fully involved in the day to day operation of the proposed premises.
32. Details of staffing policies and staff training and compliance requirements are set out in the House Management Policy and Management Plan (including Code of Conduct) lodged by the applicant.

35. The applicant claims there is no other type of licence suitable for the premises and its proposed trading method.

Submissions of Commissioner of Police (First Intervener)

36. The first intervener is concerned that if no conditions are imposed, the grant of the application could allow the applicant to move away from the benefits intended for the community and install a liquor establishment which may inflict harm or ill health.
37. A special facility licence cannot be granted if the granting of a licence of another class would achieve the purposes for which the special facility licence is sought. That is, there is no power for the licensing authority to grant a special facility licence if another licence is suitable.
38. The purpose for which the applicant has applied for a special facility licence is to establish a small, unique wine tasting and retailing outlet to operate as a satellite store to its main winery in the Swan Valley and to provide an educational wine appreciation and interpretive experience for the public with an option to purchase packaged liquor.
- This purpose can be achieved through granting a liquor store licence under section 47 of the Act and accordingly, section 46(c) precludes the grant of a special facility licence.
39. A liquor store licence would, rather, facilitate the applicant's purpose as the ability to provide free samples set out at section 47 (2) of the Act indicates that the legislation intended liquor store licensees to promote liquor education and interpretation.
40. The applicant has an onus of proof to establish the merit of its application and must adduce sufficient information to make it possible for the licensing authority to be satisfied that the application is in the public interest.
41. It is not sufficient for an applicant merely to express opinions about the perceived benefits of its application, such opinions and assertions must be supported by an appropriate level of evidence.
42. The concerns are based on the extensive experience of the Liquor Enforcement Unit in observing (and assisting in the supervision of) all different kinds of licensed premises in this State and the reasoning which underlies those concerns is readily apparent. It is a matter for the Commission whether it accepts that reasoning and if so, what weight it considers should be placed on it.
43. It is acknowledged that there will always be some element of speculation when anticipating concerns for harm or ill health that may be caused by the establishment of a facility which is not yet in operation. It does not need to be

proved on the balance of probabilities that such harm or ill health will result before the Commission can properly take note of the risk that might eventuate.

44. The present application is novel in the sense that it is a proposed outlet like no other in the State. When considering a novel application it will always be necessary to speculate to some degree because the amount of analogous empirical evidence in such applications will be sparse. This does not prevent the Commission from accepting and adopting the reasoning process underlying the proposed conditions in the event the Commission considers to be compelling.
45. The applicant states that it agrees to most of the conditions proposed by the first intervener – the fact that the applicant has done so suggests it does not consider the concerns of the first intervener to be fanciful, mere conjecture or otherwise unreasonable.

Second Intervener's Submissions

46. These submissions were an expansion of the matter already raised viz that the licensing authority must have 'paramount regard' to the potential of the proposed licence to cater for the requirements of consumers of liquor with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State. However this does not take into account that the object (section 5(1)(c) is only one of the three primary objects of the Act – is a consideration that is to be balanced equally against the other objects of the Act set out in section 5(1)(a) and (b) of the Act.
47. As to the evidence regarding the enhancement of the tourism industry:
 - a) it is relevant that only one tourism operator out of the three that provided letters of support noted it intended to bring tourists to the proposed premises;
 - b) participants who completed the public questionnaires and letters of support express opinions that the proposed premises will enhance the attractiveness of the Fremantle Markets to tourists – however there is no indication of their experience or training that would give them the basis to make this assertion and such opinions should be treated cautiously by the licensing authority in accepting what is essentially unsubstantiated opinion evidence by non-qualified witnesses;
 - c) it is noteworthy that the applicant submits that the proposed premises are not intended to increase patronage of the Fremantle Markets to any great extent;
 - d) with regard to the provisions of section 46(2) of the Act the only question for the licensing authority regarding purpose is whether the kinds of purposes that are recognised by the Act and the Regulations can be satisfied by an alternative licence type;

- e) in this case the applicant's primary purpose in seeking the grant of a special facility licence is to establish a retailing outlet that acts as a satellite store to its main winery and to establish a wine education and interpretive experience for its patrons – in simpler terms the purposes of the licence are to provide a distribution point for the sale of the applicant's liquor to all patrons of the Fremantle Markets (not simply tourists) who are also interested in being educated about wine and viticulture;
- f) these are purposes that are recognised by the Act that can be achieved under a liquor store licence. Therefore, section 46(2) operates to preclude the grant of the special facility licence;
- g) the second intervener considers that no available class of licence would be appropriate for the establishment of the applicant's proposed outlet – because the grant of any licence to set up what is in essence a 'cellar door' market stall that allows producers to charge for tasting samples of their wine does not fit within any of the available classes of licence set out in the Act.

Applicant's Responsive Submissions

- 48. The applicant endorses, accepts and agrees with the conditions proposed by the first intervener with the exception of:
 - a) Condition 4 item c which restricts liquor available to 6 white wines 6 red wines and 2 fortified wines – the applicant suggests that to allow flexibility to show and sell older vintage (aged) wines and to make and show small batches of alternative varieties EITHER condition 4 item c is changed to allow for 10 white wines 10 red wines and 3 fortified wines OR condition 4 item c is changed to "no other liquor is permitted to be sold or supplied".
 - b) The applicant asserts that the combination of condition 4 item c (only wine produced by the applicant can be sold for consumption on or off the premises) and a changed condition 4 item c (no other liquor is permitted to be sold or supplied) would adequately enforce the first intervener's requirements.
- 49. The applicant submits that there is no issue with the compliance with formalities, the eligibility of the fitness of the applicant and its officeholders or the eligibility to be granted the licence sought. Furthermore, matters relevant to section 38 of the Act and the factors which prove that the application is in the public interest and on the merits have been addressed in detail in the application documentation.
- 50. The submissions and evidence presented in support of the application collectively should readily persuade the Commission to find in favour of the applicant in terms of sections 5 and 38 of the Act, however should the Commission not be so persuaded, then the overriding discretion in section 33 of the Act should be exercised in favour of the applicant. The application has been carefully researched, planned and well presented and is supported by a large volume of probative evidence and none of the applicant's evidence has

been challenged.

51. The applicant also submitted that despite section 46 (2) of the Act, case authorities indicate that in interpreting this provision the licensing authority must focus on the reference to “purposes” in that section. A large number of special facility licences have been granted under the Act and many of those businesses granted special facility licences could technically or strictly speaking operate under a licence of another class and the purposes for which the Upper Reach special facility licence are now sought are radically different from the purposes of a liquor store.
52. In relation to the second intervener’s submissions concerning “catering for consumers needs” – the Upper Reach facility will do just that – the facility will provide choice and diversity and easy access to a product and service not otherwise readily available in the area and will most certainly cater for consumers.
53. There is nothing specific or implied in the Act against wine producers having satellite stores around Perth and the general concept of packaged liquor being available at markets is not unique in Western Australia – Fremantle Markets has an existing bar and licences also operate at markets in Wangara, Morley and Malaga and elsewhere. The fact that any applicant stands to gain something commercially does not mean that the applicant is not motivated to address consumer requirements which are not currently being met in the market.
54. The applicant strongly refutes the second intervener’s submissions criticizing the applicant’s evidence – even if the matter were to be determined on the basis of only 43 public questionnaires, the licensing authority has seen fit on previous occasions to grant licences on the basis of much less public evidence. The public questionnaires and the letters of support collectively provide compelling, personal expressions of support and the evidence is highly probative.
55. The proven tourism component to this case must be given considerable weight in the determination given the importance of the tourism industry in the Act which has been elevated by time and now appears in the primary objects. The Commission is obliged to have regard for the objects provisions in exercising its discretion.

Determination

56. The applicant, who operates Upper Reach winery in the Swan Valley, seeks the grant of a special facility licence in order to establish a small satellite outlet in the Fremantle Markets to complement its existing Swan Valley winery. The proposed licensed premises will provide patrons with a wine appreciation and education experience whereby they can sample and purchase, as packaged liquor, wines produced by Upper Reach winery.

57. The Act places an onus on the applicant to satisfy the licensing authority that:
- the grant of an application is in the public interest (section 38(2));
 - the purpose for which the licence is sought is a prescribed purpose (section 46(1) and regulation 9A);
 - no other class of licence under the Act, with or without conditions, would achieve the purpose for which the special facility licence is sought (section 46(2)).
58. The applicant has submitted that the prescribed purpose for which the licence is sought is tourism, and that the proposed licensed premises will enhance Fremantle as a tourist destination and also WA's wine tourism industry and will become a significant attraction in its own right for tourists. The small size of the premises, limited sample wine range and the restriction of purchasing only wines produced by Upper Reach, combined with the somewhat conflicting claims as to the impact on the numbers of persons attending the markets, provide only limited support for the case for this licence to attract tourists or enhance the State's tourism industry.
59. The Commission finds it hard to see how tourist numbers to the Fremantle markets would be affected by the grant of the application nor is it convinced that the Swan Valley and Upper Reach in particular would see any influx of tourists attributed to the Fremantle Markets exposure.
60. The Fremantle market survey did not provide any information as to whether the respondent is a tourist or local community member. The public questionnaires under consideration were completed by 11 tourists and 32 members of the local community.
61. Irrespective of the number of questionnaires or number of signatures to (say) a petition or survey, it is the probative value of this evidence that is the issue not the numbers. Among other things this will depend on how the questionnaires were framed, by whom collected and collated, whether there was any culling of opposing views and how there were obtained. In *Woolworths Ltd v Commissioner of Police* (LC 12/2013), the Commission observed that:
- "Historically, the Commission has tended to treat petitions with some caution. Whilst giving an indication of the public's level of support for the establishment of an outlet, petitions rarely, if ever, by their nature, give an indication of the number of people with a contrary view."*
62. Given the above observation, the Commission has consistently regarded questionnaires and surveys with caution and in this instance also weighs the views of the local community as to the impact of the application on tourism with caution.

63. Ultimately, the Commission is of the view that the applicant has not established to the satisfaction of the Commission that its proposed licensed premises will enhance Fremantle as a tourist destination or that the premises will become a significant tourist attraction in its own right.
64. In determining whether the grant of an application is in the public interest, the Commission is required to exercise a discretionary value judgment confined only by the scope and purpose of the Act. (*Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*). The scope and purpose of the Act can be ascertained from its objects, which are set out in section 5, the primary objects of the Act being
- a) to regulate the sale, supply and consumption of liquor;
 - b) to minimise harm 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.
65. The Act imposes a restriction on the sale and supply of liquor by a producer to premises where the liquor is produced, or if those premises are not in a convenient location, other premises in reasonable proximity to where the liquor is produced.
66. The Commission is of the view that it would be contrary to the intent of section 46 of the Act to grant the application and would require an interpretation of section 46 which is beyond the current regulatory scheme as contemplated under the Act. This discretion is not open to the Commission.
67. It is not consistent with the proper development of the liquor industry to allow existing licensees who hold a producers licence under the Act to set up a satellite outlet, many kilometers from their existing licensed premises, not in reasonable proximity to where the liquor is produced, to promote and sell their wines.
68. In considering whether the grant of the application will be catering to the requirements of consumers, it is also relevant to consider the proper development of the liquor industry, tourism industry and other hospitality industries in the State. The applicant is seeking to establish a satellite cellar door outlet and expressed the difficulties it experiences in marketing and exposing its wines to the public. There are several statements in the applicant's PIA that support the second intervener's view that enhancing the applicant's existing business interests is indeed a major, if not the prime, consideration rather than the consumer / tourist requirements.

69. The Commission is of the view that the applicant has failed to meet the requirements of section 38(2) or to demonstrate that the grant of this licence is consistent with the intent and purpose of section 46 of the Act.
70. The Commission is not satisfied that there is any persuasive argument for the exercise by it of its discretion pursuant to section 33 of the Act.
71. Accordingly the application is refused.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

JIM FREEMANTLE
CHAIRPERSON