

**Liquor Commission of Western Australia**

***(Liquor Control Act 1988)***

**Applicant:** Woolworths Limited  
*(represented by Mr Gavin Crocket of GD Crocket & Co assisted by Ms. Susan Nicholson)*

**Intervener:** Executive Director Public Health  
*(represented by Mr Sam Nunn of State Solicitor's Office)*

**Commission:** Mr Eddie Watling (Deputy Chairperson)  
Mr Greg Joyce (Member)  
Dr Eric Isaachsen (Member)

**Matter:** Application for the conditional grant of a liquor store licence referred under section 24 of the *Liquor Control Act 1988*

**Premises:** Dan Murphy's Canning Vale, 888 Nicholson Road, Canning Vale

**Date of Hearing:** 7 September 2011

**Date of Determination:** 12 January 2012

**Determination:** The application is approved

**Authorities referred to in determination:**

- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* (2000) WASCA 258; 22 WAR 510
- *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207
- *Malec v JC Hutton Pty Ltd* (1990) 169 CLR
- *Hay Properties Pty Ltd & Anor -v- Roshel Pty Ltd*, unreported; FCt SCt of WA; Library No 980496; 20 July 1998

## **Introduction**

- 1 On 18 February 2010 Woolworths Limited lodged an application with the Director of Liquor Licensing for the conditional grant of a liquor store licence, pursuant to sections 47 and 62 of the *Liquor Control Act 1988* ("the Act"), in respect of premises to be known as Dan Murphy's Canning Vale and located at Lot 1, 888 Nicholson Road, Canning Vale.
- 2 A notice of intervention dated 5 April 2010 was lodged by the Executive Director Public Health pursuant to section 69(8a)(b) of the Act.
- 3 On 4 May 2011 the Director of Liquor Licensing, pursuant to section 24 of the Act, referred the application to the Liquor Commission ("the Commission") for determination.
- 4 A hearing before the Commission was held on 7 September 2011.

## **Submissions on behalf of the applicant**

- 5 The applicant seeks to open a Dan Murphy's liquor store within an existing complex located on the corner of Ranford Road and Nicholson Road, Canning Vale. The retail and commercial hub of the locality is clustered around this intersection – on the north-west side of the junction is the Livingston Market Place ("the Centre"), the district shopping mall.
- 6 The proposed liquor store will be located in an existing building which is to be refurbished to provide approximately 1,529 m<sup>2</sup> of floor space consisting of 1,074.3 m<sup>2</sup> of display/sales area and 82.7 m<sup>2</sup> of cool room/liquor storage area plus staff amenities and office space.
- 7 It was submitted that Dan Murphy's is an established, reputable liquor store brand which successfully operates in other parts of Australia, but is relatively new to the WA market. The proposed liquor store will provide a matrix of services which will be hallmarked by:
  - large, stylish facilities designed to provide a pleasant and unique shopping experience;
  - the best range of liquor (over 4,000 product lines) including local, Australian and international products;
  - the best possible prices;
  - a dedicated fine wine area;
  - knowledgeable, well-trained staff;
  - a commitment to providing "the best range of premium wines of any Australian retailer"; and
  - superior customer services and facilities such as:

- (i) twice weekly wine tastings;
- (ii) speciality events;
- (iii) gift cards;
- (iv) event planner services; and
- (v) trolleys for customer use.

- 8 According to the applicant, almost 22,400 people live in the locality, with the population having almost doubled since 2001. Consistent with being a relatively new urban area, the population is largely comprised of young families and overall is predominantly Australian born and relatively affluent. No particular group is significantly inconsistent with the Perth Statistical District (PSD) and WA proportions. Overall the locality's population is low risk as far as "at risk" groups for liquor-related harm are concerned and no major liquor-related issues exist in the locality. Although some alcohol-related harm and ill-health occurs in the region which contains the locality, the level of harm or ill-health is no greater than, or inconsistent with, that which occurs in the Perth metropolitan area as a whole.
- 9 It is recognized by the applicant that the relationship between alcohol consumption and social health problems is a complex one. While there is some research that suggests an increase in the availability of liquor can lead to increased harms, such research is often general in nature, not necessarily reflective of local factors including demography, nor the management of the outlet. The applicant was of the view that the grant of this application would be unlikely to negatively impact on any alcohol-related harm or ill-health that occurs in the locality as defined.
- 10 The applicant submitted that the grant of the application will have a number of positive benefits, including:
- (a) the premises will introduce a new type of packaged liquor amenity into the locality. The services and facilities to be provided are noticeably absent at the existing (limited) packaged liquor services in the area.
  - (b) The location of the premises is strategic as it is:
    - (i) located at the intersection of two major roads in the locality, which carries a significant volume of traffic;
    - (ii) located in a position which is easily accessible from all sections of the locality, as well as by people passing through the locality; and
    - (iii) directly across from the centre, the premier retail and grocery shopping area for the locality.

- (c) Being situated within a designated and established commercial complex the premises is in keeping with its surroundings. No changes to the existing traffic or parking arrangements are required and the activities relating to the premises will blend into those which already occur. As the premises is an existing building from which businesses have been operating, a pattern of trade at the premises already exists.
  - (d) As a Dan Murphy's store, the premises will appeal to older, more affluent and discerning customers. 72% of Dan Murphy's customers are aged 35 years of age or older and 31% have household incomes of over \$100,000 per annum. By and large these are not "at risk" persons. It will be these types of persons who seek out the unique services to be offered at the premises, and visitors to the Centre who will predominately patronise the store.
  - (e) Redevelopment of the premises will put to use an existing, partially vacant, commercial tenancy.
  - (f) The introduction of the store will result in economic benefits to the local community – it will create enhanced business activity within the local area and the provision of 30-40 full and part-time new jobs.
- 11 It was submitted that the locality is severely under-serviced for packaged liquor services, both in terms of number and diversity. Currently only two of the three commercial liquor licensed premises in the locality have dedicated facilities for the sale of packaged liquor. Each of the existing liquor stores provides for 'convenience needs' due to their location, size, limited product range and trading hours. Dan Murphy's will provide a combination of superior customer service, knowledgeable trained staff and an extensive product range of local, national and international liquor products, with a focus on fine wines (including a Cellar Release Program).
- 12 The applicant also obtained the views, by way of questionnaire, of people who either live, work, visit or pass through the locality. All the 16 respondents purchase packaged liquor and they indicated support for the convenience, affordability, expert advice and improved browsing space available in a Dan Murphy's store and commented that the current liquor stores in the locality were unsatisfactory from their viewpoint.
- 13 The applicant submitted that Dan Murphy's stores are particularly unattractive to "at risk" persons due to the format of the store and the way they are operated i.e. a large, bright department store with a large number of staff present at all trading times, restricted access and exit points and a high level of security, including a state of the art digital CCTV system. In addition, the focus of the store is wine. It is not a discount liquor barn, nor is it a "beer and bourbon" outlet.
- 14 It was submitted that the applicant is committed to working to minimise and manage the risk of alcohol-related harm to the local community and will implement and rigorously enforce at the premises, comprehensive management practices and policies that are in place at its licensed premises throughout Australia.

- 15 In order to fulfil its obligations under section 38 of the Act, the applicant submitted a Public Interest Assessment (PIA) together with additional evidence and expert reports. The expert reports included a town planning report (The MGA Report) and an environmental and health assessment (the Caporn Report).
- 16 The MGA Report:
- identified the locality for the application;
  - identified the characteristics of the locality;
  - made observations on the demographics of the locality and provided a socio-demographic profile;
  - reviewed from a town planning perspective, the nature of the immediate surrounds for the proposed premises and commented on the appropriateness of the premises in this location;
  - identified, reviewed and commented on each of the liquor licences authorised to sell packaged liquor in the locality and reviewed the services and amenity of each; and
  - considered the requirement of the public for the services to be offered at the proposed premises.
- 17 The Caporn Report:
- considered the health and environmental aspects relevant to the application taking into account the demographics of the locality, health and crime statistics for the locality; location of the premises and the services to be offered from the proposed premises;
  - looked at the nature of the locality and the services, facilities and amenities of the locality;
  - identified, what, if any, sensitive or at-risk groups or places in the locality or within close proximity to the licensed premises;
  - detailed consultations undertaken with the local government and police;
  - reported on the existing packaged liquor facilities in the locality; and
  - considered the appropriateness of the proposed premises.
- 18 Overall, it was submitted that the proposed premises will provide an unrivalled matrix of packaged liquor services specifically designed to meet the requirements of modern day consumers which are not provided for by existing packaged liquor outlets in the locality.

## Submissions on behalf of the Executive Director Public Health

- 19 The Executive Director Public Health (“EDPH”) intervened in the application for the purposes of introducing evidence or making representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill-health.
- 20 It was submitted that the key concerns regarding the application include:
- the risk of harm/ill-health caused to people in and outside of the Canning Vale locality, should this application be granted;
  - the proposed large size of the store (1,529 square metres) together with Dan Murphy’s lowest price guarantee, will increase the physical and economic availability of liquor in the locality; and
  - research which shows increasing the physical and economic availability of alcohol can increase associated harm.
- 21 In respect to the availability of alcohol, there are currently 32 active licensed premises in the locality, six located within a 3km radius from where the Dan Murphy’s store is proposed, with two of the premises being within a 2km radius.
- 22 The applicant states that the two existing packaged liquor within the 2km radius fail to provide a wide range of diversity of packaged liquor services to the resident’s population of almost 22,400 people. However, it would appear that the number of people the existing packaged liquor outlets are servicing is in fact smaller than the application states. That is, given that there are a higher proportion of children in the locality, compared to PSD and WA proportions (25% for the locality compared to 19.5% for PSA and 20.3% for WA) it is concluded that at least 25% (5,600) of the resident population are not permitted to purchase alcohol.
- 23 Given there are several other liquor stores surrounding the locality of the proposed premises, introducing an additional licence which has a ‘lowest price guarantee’ will potentially lead to price discounting, appealing to those more at risk of harm.
- 24 The EDPH provided a variety of research material to support his concerns. For example, a recent local study by Gardiner, R & Coase, P dated March 2011, *Cheap Drinks*, Drug and Alcohol Office, Department of Health, establishes a link between the price of alcohol and consumption. The EDPH also referred to the work of Chikritzhs, T., Catalano, P., Pascal, R., and Henrickson, N (2007), *Predicting Alcohol-related harms from licensed outlet density: A feasibility study*. Monograph Series No. 28. National Drug Law Enforcement Research Fund, Commonwealth of Australia, Hobart. The overall aim of the feasibility study was to progress the development of an Australian model sensitive to local risk factors to help authorities determine appropriate liquor outlet densities for minimising alcohol –related harms within communities.

- 25 The EDPH also commented on the demographics of the locality and noted the presence of several 'at risk' groups as identified by the Director of Liquor Licensing's Policy "Public Interest Assessment" 7 May 2007 ( and 2007, 2008 reviews ). Specifically –
- 62.8% of the family households in the locality were couple families and children;
  - 25% of the population of the locality consists of children under 14.
- 26 It was submitted that there is clear research, including Australian studies, regarding the link between packaged liquor and harm and that the applicant has not sufficiently responded to the impact that significant increase in the physical and economic availability of alcohol from their store will have on the surrounding "at risk" population and other members of the general public.
- 27 In summary, it was submitted by the EDPH that:
- the area affected by the application is broader than the immediate 2km vicinity, as the proposed premises is a "destination liquor store", has a corner position on the site and high visibility to both Nicholson and Ranford Roads and expressly targets locals and people passing through the region. As a result it is appropriate that the evidence on which the EDPH relies has relevance that is not limited to the locality;
  - statistical data for the locality demonstrates that certain social groups who are considered to be at greater risk of liquor-related harm are resident in the locality at comparatively higher rates than the PSD and Western Australia generally;
  - police data shows that overall there is already a level of alcohol-related harm in the locality and surrounding suburbs, in particular violence and drink-driving;
  - there is sufficient documentation to establish a link between the price of alcohol, alcohol consumption and alcohol-related harm, specifically that an increase in the availability of alcohol leads to an increase in alcohol consumption which in turn is linked with increased violence, drink-driving and property damage. The conclusion to be drawn regarding the potential for the relative price of liquor to influence consumption is supported by evidence provided by the EDPH;
  - there are also published studies that establish the connection between the sale of packaged liquor and alcohol-related harm; and
  - recent media reports indicate the level of community concern in regards to alcohol-related harm and the availability of cheap liquor.
- 28 Although the applicant may adopt some harm minimisation strategies within the bounds of its licence, the fundamental issue is the general risk to persons in the locality and surrounding suburbs promoted by the increased access to cheap liquor which is consumed away from the premises.



- 29 Consequently, the EDPH submitted that the impact of increasing the physical and economical availability of packaged liquor and the potential for even a minimal increase in the risk of alcohol-related harm are relevant factors to consider when the Commission determines the application.

### Determination

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

- 31 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) WASCA 175 and Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*). The Commission 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.”*

- 32 Also, section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material, including the Second Reading Speech to a Bill, when considering the meaning and intent of a written law.

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

- to regulate the sale, supply and consumption of liquor;
- to minimize harm caused to people, or any group of people, due to the use of liquor; and
- 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.

- 34 Each application must be considered on merits and determined on 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 minimizing 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] WASCA 258*).
- 35 The applicant seeks to refurbish an existing building located in a commercial centre in order to establish a 1,529 m<sup>2</sup> packaged liquor outlet trading under the Dan Murphy's banner. The display/sales area will be 1,074.3 m<sup>2</sup> and 82.7 m<sup>2</sup> of cool room/liquor storage area plus staff amenities and office space. By comparison the average size of packaged liquor outlets in WA is 250 m<sup>2</sup>. A substantive body of material was submitted by the applicant in support of its application and by the intervener in support of its argument.
- 36 In respect of the harm or ill-health that may be caused to the community by the grant of the application, the Commission is unable to reach a negative conclusion based upon the evidence and material advanced by the EDPH. Whilst general harm data is relevant and of assistance to the licensing authority in its determination and should be given due consideration, the weight to be given to this general data will depend on the circumstances of each application, particularly where the general harm data is supported by more specific evidence relating to the area to which the application relates. This approach is consistent with the views expressed in a recent decision in Victoria, *Director of Liquor Licensing v Kordister Pty Ltd & Anor [2011] VSC 207*, where Bell J said:

*“As the tribunal has held, every application for a liquor licence cannot be refused on the basis of general harm minimisation evidence. That would be a perversion of the regulatory scheme. The legislation regulates the supply and consumption of liquor by individuals exercising freedom of market choice. It acknowledges the benefits which the industry brings and provides a regulatory framework for the realisation of those benefits.*

*But by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the ‘particular local, social, demographic and geographic circumstances’ of the given case.”*

- 37 It is also important to observe that the primary object in section 5(1)(b) of the Act is to 'minimize' harm or ill-health, not to prevent harm or ill-health absolutely. Furthermore, the statutory framework is not predicated upon the concept of prohibition, but establishes a regulatory mechanism for the granting of liquor licences and the operation of licensed premises which are in the public interest.
- 38 In this case, the harm data presented by the EDPH does not reflect a local community experiencing any greater levels of alcohol-related harm than that which appears to be commonly accepted in the community. The demographic factors indicate the family nature of the locality with an age distribution of 25 % children age 0-14 and 19.2 % adults age 35-44 – both higher than PSD and WA. Apart from these, the 'at risk' categories are below both the PSD and WA figures. In relation to this application the Commission is unable to conclude or predict (refer *Malec v JC hutton Pty Ltd (1990) 169 CLR*), on the balance of probabilities, that the grant of the licence would pose an unacceptable risk of increased alcohol-related harm in the local community when regard is given to the "particular local, social, demographic and geographic circumstances" of this case.
- 39 Further, in consideration of the evidence submitted by the applicant, particularly the MGA Report and the Caporn Report, the Commission is satisfied that the grant of the application will not negatively impact on the amenity of the locality or cause undue offence, annoyance or disturbance to people who reside or work in the vicinity of the proposed premises.
- 40 As observed earlier, in considering whether the grant of an application is in the public interest, the Commission needs to consider both the positive and negative aspects of the application and how the application will promote the objects of the Act, particularly the harm minimisation objective and whether the grant of the application will cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries.
- 41 The applicant submitted that the grant of the application will provide a number of benefits to the local community, including increased competition; the introduction of a large, modern liquor store with superior customer service and product range; a convenient location; the refurbishment of existing infrastructure and a branded Dan Murphy's store which will appeal to older more affluent and discerning customers. To demonstrate that the grant of the application will cater to the requirements of consumers for liquor and related services, the applicant relies upon the paucity of liquor outlets in the vicinity, the demonstrated standards of Dan Murphy's business practice, the 16 responses to its questionnaire; and the submission that because Dan Murphy's stores have proven to be popular in other localities it will therefore be popular in this locality.
- 42 The Commission has previously determined that it does not accept the general principle that because a business model has proven to be popular in other localities that this justifies the grant of a new licence in any other locality. The Commission does, however, accept that the Dan Murphy's liquor store business model is well managed, offers an

extensive range of products and services and provides a high level of responsible retailing of liquor products.

- 43 Therefore, in association with the particular circumstances of the locality, particularly the absence of a packaged liquor supermarket style of operation or “destination” liquor store, the Commission is prepared to give some weighting to the contribution that such a facility would make to meeting the requirements of consumers, as prescribed in section 5(1)(c) of the Act.
- 44 At the hearing before the Commission, counsel for the applicant was questioned by the Commission about the level of evidence submitted to demonstrate that the grant of the application will cater for the requirements of consumers. In the transcript at page 9 Mr Crocket spoke to his document entitled ‘The Concept of Requirement: A historical analysis’ and then explained how the particulars of this case fitted with the concepts indicated in the document. He further commented on the issue of what may constitute adequate evidence of the requirements of the public by reference to Malcolm CJ in *Hay Properties Pty Ltd & Anor -v- Roshel Pty Ltd, unreported; FCt SCt of WA; Library No 980496; 20 July 1998*. The Commission does note that the *Hay Properties* case was determined under the previous provisions of the Act which related to the “needs test” and that this test no longer applies. There is nonetheless a corollary of the principles in that case to the issue of what evidence is necessary to demonstrate that the grant of a licence will cater to the requirements of consumers, and consequently promote one of the primary objects of the Act.
- 45 Mr Crocket also referred to the fact that there had been no objections to this application. The Commission noted that this fact may be relevant when determining the weight to be given to submissions, but is not, of itself, to be interpreted as indicating that the application is in the public interest.
- 46 The Commission is, however, persuaded that the evidence submitted in this case does satisfy that the grant of the application for a new liquor store licence will cater for the requirements of consumers and that it is in the public interest for the introduction of retail packaged liquor services and facilities not currently available in this locality.
- 47 The Commission is further satisfied that the applicant has discharged its onus under section 38 of the Act and the grant of the licence is in the public interest. Accordingly, pursuant to section 62 of the Act, a liquor store licence is conditionally granted to the applicant for premises to be known as Dan Murphy’s Canning Vale and located at 888 Nicholson Road, Canning Vale subject to standard conditions imposed by the Director of Liquor Licensing, the premises being completed in accordance with the plans and specifications lodged; the holder of the conditionally granted licence seeking confirmation of the grant within 12 months and any other lawful requirement of the Director of Liquor Licensing.
- 48 Finally, pursuant to section 104 of the Act, the Commission also approves of the profit sharing arrangement between the applicant and the landlord of the premises as set out

in the lease document submitted with the application.

- 49 Prior to the commencement of the hearing before the Commission, the applicant sought some interlocutory orders in respect of the status of the intervener, the submissions made by the intervener and other matters. With the consent of the parties the Commission reserved its decision on the proposed orders. The Commission confirms that the defined locality for the application is a 2 kilometre radius around the proposed site of the premises, which is in accordance with the policy of the Director of Liquor Licensing. The reference to the locality in respect of an application is to define the area which relates to the potential impact that the grant of the application may have on the amenity of the locality (refer section 38(4)(b)). It does not limit the consideration in respect of the harm or ill-health that may result from the grant of an application or any other public interest aspects. Indeed it was clearly contemplated by the applicant that it would be providing for the requirements for liquor and related services by consumers beyond the locality by reference to the needs of the large volume of passing traffic on Ranford and Nicholson Roads. The applicant confirmed in its submission (4.2(e) of the PIA) that the store would operate as a "department" destination liquor store. By consent the status of the EDPH was confirmed as that of an intervener and the Commission has given appropriate weighting to the submission made by the EDPH without the deletions as requested by the applicant.



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**EDDIE WATLING**  
**DEPUTY CHAIRPERSON**