

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

Applicants: David McGeogh and Paul Ozanne
(represented by Mr Ian Curlewis of Lavan legal)

Objectors: Ivorybow Pty Ltd
(Licensee of Liquor Barons Lesmurdie, represented
by Mr John Prior, instructed by Ilberys Lawyers
Pty Ltd)

43 Resident Objectors
(represented by Mr John Prior, instructed by Ilberys
Lawyers Pty Ltd)

Other Resident Objectors

Diane Bailey

Valma Bristow

Kevin Blake

Les and Rosemary Schofield

J Guilbert

Verna Williams

Natalie Boyd-Ratcliff

Karen Povah

Christine Ellis

Yvonne Kirkpatrick

Kathryn and Mark McCormack

Stuart Henry

Carol Everette

John and Colleen Grant

Miriam Giura

David Carroll

Christine Anderson

Ms Amelia Toffoli (Principal of St Brigid's College)

Shire of Kalmunda

Interveners:

Executive Director Public Health
(represented by Mr David Leigh, State Solicitor's
Office)

Director of Liquor Licensing
(represented by Mr David Leigh, State Solicitor's
Office)

Commission:

Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan
Mr Greg Joyce

Date of Hearing:

28 May 2010

Date of Determination:

17 June 2010

Matter:

Application for the conditional grant of a liquor store
licence

Determination:

Application for the conditional grant of a liquor store
licence refused

Authorities cited in determination

Hancock -v- Executive Director of Public Health [2008] WASC 224

Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241

*Executive Director of Health -v- Lily Creek International Pty Ltd & Ors [2000] WASCA
258*

Introduction

- 1 On 4 September 2009 David McGeogh and Paul Ozanne (“the applicants”) lodged an application for the conditional grant of a liquor store licence for premises to be known as Lesmurdie Liquor and located at Lesmurdie Road Shopping Centre, 241 Lesmurdie Road, Lesmurdie.
- 2 In respect of the application for the conditional grant of a liquor store licence, the following objections were lodged:
 - 60 residents (43 submitted a combined objection and 17 submitted individual objections);
 - the Principal of St Brigid’s College;
 - Ivorybow Pty Ltd (licensee of Liquor Barons Lesmurdie); and
 - the Shire of Kalamunda.
- 3 On 16 November 2009 and pursuant to section 69(8a) of the Act, the Executive Director Public Health (“the EDPH”) lodged a Notice of Intervention.
- 4 In decision A203011 dated 8 February 2010 the Director of Liquor Licensing refused the application.
- 5 On 5 March 2010 David McGeogh and Paul Ozanne lodged an application pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) for a review of the Director’s decision.
- 6 On 15 March 2010, pursuant to section 69(11) of the Act, the Director of Liquor Licensing lodged a Notice of Intervention.
- 7 In conducting a review under section 25, the Commission is not constrained by the finding of error on the part of the Director of Liquor Licensing, but is to undertake a full review of the materials before the Director and make its own determination on the basis of those materials (refer *Hancock -v- Executive Director of Public Health [2008] WASC 224*).
- 8 A hearing was conducted on 28 May 2010.

Submissions on behalf of the applicants for the conditional grant of a liquor store licence

- 9 The applicant seeks to establish a liquor store of approximately 200m² at the Lesmurdie Shopping Centre, which contains an IGA store, newsagency & post office, hair and beauty salon, a butcher and a chemist.
- 10 For the purposes of the application, the relevant locality is a three kilometre radius of the site, which includes the suburbs of Lesmurdie, Kalamunda, Walliston and Carmel. Lesmurdie is one of 15 suburbs in the Shire of Kalamunda and is located in the eastern

hills of Perth, about 25 kilometres from the Perth CBD. Lesmurdie is primarily a residential area although there are some social hubs scattered throughout.

- 11 According to the applicant's Public Interest Assessment (PIA) the Cultural Plan developed by the Shire of Kalamunda is designed to bring the community together through various activities and encourage the development of a vibrant community. In conjunction with the Cultural Plan, the Shire's five year and 25 year strategic plans reflect increased amenities and development for the area such as new water recreation facilities and other social hubs including restaurants. A liquor store will be in line with the community strategic plans.
- 12 On the corner of Lesmurdie Road and Rooth Road there is a new land development called Stirkwood Estate. This estate is a 42 block development which will be largely residential, and as a consequence of an increasing demand for amenities in Lesmurdie, the owner of the Lesmurdie Shopping Centre will upgrade the Centre, with the establishment of the Lesmurdie Liquor Store being the first of many planned changes.
- 13 The applicant's PIA addressed the matters set out in section 38(4) of the Act and provided data on the demographics of the locality and existing levels of crime. It was submitted that with the exception of graffiti, the occurrence of crime in the locality is significantly lower than the state average and over the last two years rates of crime have stayed relatively constant.
- 14 The applicant provided details of the strategies it would adopt to minimise any negative impact that the grant of the licence may have on the locality including the use of CCTV, ID25 checks to discourage juveniles and adopting "Designing out Crime" principles.
- 15 The applicant was of the opinion that the grant of the application would be in the public interest because:
 - It will add to the amenity of the local community. There is no liquor store within the immediate locality and there are only two other liquor stores within three kilometres of the proposed liquor store. The addition of products presently unavailable in the Lesmurdie Shopping centre will mean the area is better serviced for local residents.
 - Convenience shopping will be provided as the patrons could purchase their household liquor needs whilst doing their grocery shopping at the centre;
 - It will better utilise the vacant space in the Lesmurdie Shopping Centre and allow refurbishment by the landlord which will be in the public interest;
 - It will create employment in presently vacant spaces in the Lesmurdie Shopping Centre;
 - The proposed liquor store is in line with local government planning strategy and will provide a service considered to be in the public interest;

- The Shire of Kalamunda has released cultural and strategic plans that target tourism, cultural enhancements and sense of community as areas for improvement. The proposed liquor store will carry a diverse range of products including local wines in an effort to make the store more interesting to customers.
 - The proposed liquor store will hold wine tasting evenings and sponsor local clubs or initiatives to help contribute to the sense of community;
 - Being an independent liquor store, it will have the ability to cater to the interest of the local residents. National chains are restricted to a set model of product lines. The applicants will have no such problems and will take advantage of that ability to serve its customers better; and
 - The applicants have business experience, a desire to improve their own local community and a proposed robust Harm Minimization plan to support their application.
- 16 A petition containing 237 signatures and four letters of support from local business owners/residents and a letter from the proprietor of the Lesmurdie Shopping Centre were also submitted.

Submissions on behalf of Ivorybow Pty and combined resident objectors

- 17 These objectors were collectively represented by Ilberys Lawyers Pty Ltd and relied upon similar grounds of objection under section 74 of the act, namely:
- the grant of the application is not in the public interest;
 - 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; and
 - if the application were granted the amenity, quiet or good order of the locality in which the premises are situated would in some other manner be lessened.
- 18 It was argued by these objectors that the grant of the application would be contrary to the principal object contained in section 5(1)(c) of the Act in that the grant of the application is not necessary in order to cater for the requirements of consumers for liquor and related services. Four packaged liquor outlets already exist in the locality and these premises adequately meet the requirements of consumers in the area. Furthermore, given this concentration of existing liquor outlets, research (“Predicting Alcohol Related Harm from Licensed Outlet Density: A Feasibility Study, National Drug Research Institute”) indicates that an increase in the density of licensed premises may result in increased alcohol-related harm.
- 19 Located directly opposite the proposed liquor store is St Brigid’s College, a private Catholic school which has 550 primary school students (boys and girls) and 750 year 8-12 students (girls only). The college also provides facilities for 175 boarders ranging in age from 13-18 years (girls only). The proposed liquor store will have street frontage and

the Lesmurdie Shopping Centre is frequented by students from St Brigid's including boarders who use the shops during the week and on weekends. Various publications and research papers were submitted to highlight concerns about juvenile alcohol consumption.

- 20 Finally, it was submitted that the limited parking facilities at the shopping centre will increase traffic congestion in and around the centre and therefore negatively impact on the amenity of the area. It was also asserted there is likely to be an increase in the level of anti-social behaviour in the locality if the application was granted. A petition opposing the application was also submitted.

Submissions on behalf of other resident objectors

- 21 In general terms, these objectors raised similar concerns to the combined objectors concerns about:
- the location of the proposed liquor store opposite St Brigid's College and the potential negative impact upon students; and
 - increasing the number of liquor outlets in the area, particularly when there is already a liquor store within a short distance from the proposed liquor store, and the possible increase in harm and anti-social behaviour that may result.

Submissions on behalf of the principal of St Brigid's College

- 22 Ms Amelia Toffoli, the principal of St Brigid's College, expressed concerned about the location of the proposed liquor store in such close proximity to the College, particularly in view of female teenage binge drinking becoming a significant social issue. Ms Toffoli advised that boarders of the school use the IGA supermarket and the chemist located in the Lesmurdie Shopping Centre and therefore continually exposing students to the advertising of alcohol and drink specials is undesirable. According to Ms Toffoli, St Brigid's College already engages security on Friday and Saturday nights to contain existing anti-social behaviour in the area and the grant of the application may only increase these problems. Parents of students object strongly to the application.

Submissions on behalf of the Executive Director Public Health (EDPH)

- 23 The EDPH intervened for the purpose of making representations for consideration in the decision making process, regarding,
- young people as a high risk group for alcohol-related harm;
 - the close proximity of the proposed premises to a school, which includes a boarding college, where alcohol-related problems already impact on the campus;
 - the influence of alcohol advertising on young people; and

- the need for conditions to be placed on the licence to ensure the premises become lower-risk for alcohol-related harm, should the application be granted.
- 24 According to the EDPH young people feature strongly in harm statistics with alcohol being a major contributing cause of hospitalisations and death amongst young people in WA. Young people continue to drink at high levels which are attributable to the growing normalisation of alcohol use and the increasing availability of alcohol in the community. Research demonstrates that young people are a high risk group for alcohol-related harm and it is important to reduce access and opportunity for juveniles to purchase alcohol and minimise the potential for licensed premises to influence the drinking behaviours of juveniles, particularly in a locality frequented by young people.
- 25 It was also asserted that research evidence establishes a correlation between children's exposure to alcohol advertising and the age at which they start to consume alcohol and their levels of consumption.
- 26 Consequently, the EDPH recommended that if the application is granted the licence be subject to the following condition:

"No external alcohol or venue advertising (eg signage, posters, a-frames, billboards) within 400m of the school boundary".

It was also recommended that the applicant's proposed strategy of an 'if you look under 25, you will be asked for ID' approach be implemented as part of their house management policy and plan.

Responsive submissions on behalf of the applicant

- 27 In response to the matters raised by the objectors, the applicant dismisses the objection by Ivorybow Pty Ltd as being motivated by the pecuniary interest of this party, who it was claimed was also responsible for instigating many of the resident objections, who were represented by the same solicitor and essentially relied upon the same grounds of objection. A large number of these resident objectors mentioned the possible financial damage to existing liquor stores; however this is not a valid ground of objection under section 74 of the Act.
- 28 In respect of the remaining objectors, it was asserted that the matters raised were repetitious and generally related to the possibility of negative consequences should the application be granted however no consideration was given to the applicant's detailed proposal nor was any evidence submitted to show that the proposed liquor store will cause harm or ill-health to the community as implied by the objectors. Therefore these objectors have not established the validity of their objection as required under section 73 of the Act.
- 29 The primary concern of the EDPH in his intervention was the proximity of the proposed liquor store to a school and the possible effect on juveniles. In this regard the EDPH suggested that should the application be granted a condition be imposed on the licence

restricting external advertising. The applicant believes that a complete ban on external advertising would be excessive and anti-competitive, however the applicant would commit to limited external advertising concerning only the business name of the liquor store, location of the store and a selection of wines. Consequently, the applicant would agree to the following conditions:

- performing ID 25 checks;
- internal and external CCTV;
- signage advertising ID25 checks as well as other initiatives;
- placement of ready to drink (RTD) products away from the entrance to the store; and
- advertising – external advertising will only advertise the presence and brand of the store and wines.

The applicant would also consider not stocking other products attractive to juveniles such as chocolates or chips and reduce its operating hours at the proposed liquor store.

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 Furthermore, pursuant to section 33(1), the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*).
- 32 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.
- 33 It is often the case when determining the merits of an application that tension may arise in advancing the objects of the Act, particularly the objects of minimizing alcohol-related harm whilst 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*).

- 34 The applicant seeks to establish a liquor store in a small, local shopping centre opposite a large school, which caters for both primary and secondary school students and provides facilities for up to 175 female boarders aged between 13 and 18 years old.
- 35 The onus is on an applicant for the grant of a liquor store licence to satisfy the licensing authority that the grant of the licence is in the public interest. This involves addressing both the positive and negative social, economic and health impacts that the grant of an application will have on a community (refer *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*). The applicant has addressed the matters set out in section 38(4) of the Act in its PIA and believes that the positive benefits the grant of the licence will have include providing a better service for local residents because there is no existing liquor store in the immediate locality; convenience shopping for locals who will be able to purchase liquor whilst doing their grocery shopping or making other purchases at the centre and it will better utilise the vacant space in the Lesmurdie Shopping Centre and allow refurbishment of the centre by the landlord.
- 36 The objective evidence submitted by the applicant to substantiate its claims of the positive benefits for the community consisted of a petition containing 237 signatures and four letters of support from local business owners/residents and a letter from the proprietor of the Lesmurdie Shopping Centre.
- 37 Equally, there was substantial opposition from the local community to the grant of the licence. There were 60 objections from local residents and a petition signed by people opposed to the liquor store being located in close proximity to St Brigid's College. It should be noted that there was an assertion from the applicant that many of the objections to the application were orchestrated by the licensee objector, Ivorybow Pty Ltd, and that little weight should therefore be given to these objections. Whilst it is difficult for the Commission to accept that the motivation of the licensee objector is nothing more than an attempt to protect its business and market share, the Act does not preclude an existing licensee from objecting, and ultimately the merits of such objections will be determined on the evidence.
- 38 Many objectors, including the EDPH, raised concerns about the location of the proposed liquor store in relation to St Brigid's College. According to evidence submitted by the EDPH young people feature strongly in harm statistics with alcohol being a major contributing cause of hospitalisation and death amongst young people in Western Australia. For instance:
- in 2006, there were 494 hospitalisations for 12 to 17 year olds for alcohol-related conditions;
 - during the five year period between 2002-2006, a total of 2210 12 to 17 year olds featured in hospitalisations for alcohol-related conditions; and
 - from 2000 to 2005 there were 35 alcohol-related deaths among 12 to 17 year olds in WA.

- 39 in addition, the EDPH referred to research which indicates that:
- children and young people are an at-risk group, with a number of factors combining to place young people at considerably increased risk of harm from drinking alcohol;
 - licensed premises provide unique settings that convey images and messages about community norms in relation to alcohol;
 - young people are vulnerable to the influence of the environments that they live and socialise in;
 - earlier initiation to alcohol is associated with more frequent and higher use later in life; and
 - there are clear linkages between exposure to alcohol advertising and the age at which children and young people start drinking and the amount they consume.
- 40 Further data was submitted by Ivorybow Pty Ltd and the combined resident objectors relating to the negative impact that alcohol consumption is having on young people, including females, with increasing levels of harm and consumption patterns. This data, and that provided by the EDPH was not refuted by the applicant.
- 41 In response to these particular concerns, the applicant agreed to conditions being imposed on the licence, should it be granted, relating to ID checks and signage, use of CCTV, removing RTD products away from the entrance of the store and a limitation on external advertising. The applicant also pointed out that other licensed premises currently operate in proximity to schools.
- 42 In considering the merits of this application, the Commission finds the evidence submitted by the applicant to discharge its onus under section 38(2) of the Act is not compelling, particularly the objective evidence that the grant of the licence will cater for the requirements of consumers for liquor and related services (ie a petition and a small number of letters of support), which needs to be considered in conjunction with fostering the proper development of the liquor industry (although the Commission would hasten to add, that this should not be confused with protecting licensees from competition or protecting existing market share).
- 43 Whilst there may be a degree of convenience for some sections of the community to obtain liquor at the Lesmurdie Shopping Centre, the evidence indicates that this is a modest centre consisting of a small group of shops, with an existing liquor store some 1.5 kilometres away by road. Albeit that there was some criticism of this existing liquor store, it was relatively minor. In this context, it is also important to bear in mind that the proliferation of licences is not an intended outcome of the introduction of a public interest test under section 38 of the Act. When the *Liquor and Gaming Legislation Amendment Bill 2006* was introduced into Parliament, the then Minister for Racing and Gaming, the Hon Mark McGowan, stated that government does not consider the proliferation of liquor

outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test (see Parliamentary Debates, WA Parliament, vol 409, p 6342). 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.

44 For these reasons, the Commission would refuse the application. However, there is a further reason why the Commission would refuse the application.

45 Pursuant to section 33(1) of the Act, the licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest. Notwithstanding the submissions of the applicant and the proposed conditions of the licence, the Commission is of the view that to establish a liquor store in close proximity to a large school with teenage boarders who frequent the shopping centre is not in the public interest nor consistent with object 5(1)(b) of the Act. In discharging its functions under the Act, “*the mere possibility of harm or ill-health*” is a relevant matter for the licensing authority to consider. In *Executive Director of Health v Lily Creek International Pty Ltd & Ors (2000) WASCA 258* Ipp J stated:

“The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on the balance of probabilities, would be a powerful public interest consideration.”

46 The consumption of alcohol by juveniles and the normalisation of binge drinking by young people are problems of increasing concern within the community. Alcohol-related harm within this demographic, as demonstrated by the evidence, is at disturbing levels.

47 Accordingly, irrespective of any other factor, the Commission, in accordance with the discretion afforded the licensing authority under section 33(1) of the Act, would refuse the grant of the application on the basis that the risks associated with the location of the proposed liquor store in relation to St Brigid’s College are unacceptable and not in the public interest, particularly when weighed against the marginal benefits.



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